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No. 12440

United States Court of Appeals

for the Ninth Circuit.

HUGO V. LOEWI, INC., a Corporation,

Appellant,

vs.

FRED GESCHWILL,

Appellee.

Transcript of Record

Appeal from the United States District Court, for the District of Oregon.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12440

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

ROBERT M. KERR,

STUART W. HILL,

Equitable Building,
Portland 4, Oregon,

for Appellant.

MAGUIRE, SHIELDS, MORRISON & BAILEY,

WILLIAM E. DOUGHERTY,

RANDALL B. KESTER,

723 Pittock Block,
Portland, Oregon,

for Appellee.

In the Circuit Court of the State of Oregon
for the County of Marion

No. 34863

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for his cause of action alleges:

I.

At all times herein mentioned plaintiff operated a farm located about two miles south of Woodburn and about one-half mile east of the Pacific Highway in Marion County, Oregon. During the 1947 season, about 20 acres of said farm were planted in cluster hops.

II.

At all times herein mentioned defendant was, and now is, a corporation incorporated under the laws of the State of New York, with its home office located at 33 Water Street, New York City, New York. Defendant has never qualified under the laws of Oregon to carry on business in Oregon as a foreign corporation.

III.

Defendant's business consists mainly in buying and selling hops. During all the times herein mentioned defendant was and is transacting such business in Oregon. Plaintiff's cause of action herein alleged arose in Marion County, Oregon. None of the officers of defendant resides or has an office in said county. Defendant's principal agent in Oregon, was and is, C. W. Paulus who resides and has his place of business in Salem, Marion County, Oregon.

IV.

On or about August 18, 1947, defendant inspected plaintiff's said cluster hops growing on said farm. Thereafter, on said date, defendant entered into a contract in writing with plaintiff whereby plaintiff agreed to sell, and defendant agreed to buy, said entire crop of said cluster hops grown on said farm during 1947. A copy of said contract marked "Exhibit A" is attached hereto and made a part hereof.

V.

Plaintiff duly performed all of the terms and conditions of said contract on his part to be performed except to the extent that such performance was waived by defendant, or prevented by its acts and conduct as herein alleged. Plaintiff duly completed the cultivation, harvesting, drying, curing and baling of all of said hops grown on said farm during 1947, in accordance with said contract. Pursuant to said contract, defendant advanced to plaintiff $4,000.00 to apply on the purchase of said hops.

VI.

Several times while plaintiff was picking said hops, defendant inspected them. Any defects which said hops may have had by reason of blight was apparent to defendant at the time of said inspection. Defendant instructed plaintiff to continue picking said hops under said contract, and plaintiff did so in reliance on defendant's said instruction.

VII.

In September, 1947, after said hops had been picked, dried, cured and baled as aforesaid, plaintiff, with the assent of defendant, delivered at Schwab's warehouse in Mt. Angel, Oregon, all of said hops and set same aside for defendant. Thereafter, defendant sampled and weighed in said hops.

VIII.

Said hops so weighed in by defendant consisted of 130 bales, and had a total net weight, as determined by defendant, of 26,526 pounds. Pursuant to said contract on or about September 17, 1947, plaintiff selected as the sale price for said hops the grower's market price at that time, and notified defendant in writing thereof. The sales price for said hops, so determined as provided by said contract, was 85 cents per pound. However, said contract provided that if the seed content of said hops should be less than three per cent, then said price would be increased ten cents per pound, and that if the leaf and stem content was over eight per cent then the price would be reduced according to a scale stated in said

contract, such seed and leaf and stem content to be determined by an authorized governmental agency. Pursuant to said contract, said hops were inspected by the United States Department of Agriculture and found to have a seed content of one per cent and a leaf and stem content of eight per cent. The contract sales price for said hops was accordingly 95 cents per pound.

IX.

Thereafter general market prices of hops began a downward trend and continued to decline until they reached a level of about one-half of said contract price. While said market prices were so declining, on or about October 30, 1947, defendant refused to pay for plaintiff's said hops on the stated grounds that they were badly blighted, and on no other specific ground. Said hops were not any more badly blighted than when defendant inspected and contracted to buy the same, or than when defendant subsequently inspected them from time to time and instructed plaintiff to continue picking the same. Plaintiff believes and therefore alleges that the actual reason for defendant's refusal to pay the balance due on said purchase of said hops was the general market condition described above, and that defendant would have persisted in said refusal regardless of anything more plaintiff might have done or offered to do.

X.

At all times since defendant so declined to accept said hops, they could not be re-sold for a reasonable price for the reasons that

(a) defendant's said contract of purchase purported to constitute a lien on said hops and a cloud on plaintiff's title thereto,

(b) there was an over production of hops during the 1947 season in that the amount produced was substantially in excess of the market demand, and

(c) it is not the practice of any of the hop buyers doing business in this territory to buy hops which have been rejected by another hop buyer unless the seller will waive any right of action he may have against the buyer who rejected such hops.

Therefore, plaintiff has at all times held said hops as bailee of the defendant, and so notified the defendant, and said hops are still in said warehouse subject to the disposal of the defendant upon paying the balance of the contract price due to the plaintiff.

XI.

By reason of the facts stated above defendant became indebted to plaintiff in the sum of $25,199.70 for said hops. Of that amount defendant has paid the sum of $4,000.00 (being the advances mentioned in paragraph V), and there is still due and unpaid the sum of $21,199.70 with interest thereon at the rate of 6 per cent per annum from October 31, 1947, until paid.

XII.

On several occasions after said amount of $21,199.70 became due, plaintiff duly made demand on the defendant for payment thereof but each such

demand was refused by defendant on the grounds stated in paragraph IX above, and on no other specific ground.

Wherefore, plaintiff demands judgment against the defendant for the sum of $21,199.70 with interest thereon from October 31, 1947, until paid, and for plaintiff's costs and disbursements in this action.

.....

Roy F. Shields

.....

William E. Dougherty

.....

Attorneys for Plaintiff

Exhibit A.

This agreement, made this eighteenth day of August, 1947, between Fred Geschwill of Route 2, Woodburn, Oregon, hereinafter called the Seller, and Hugh V. Loewi, Inc., of 33 Water Street, New York City, N. Y., hereinafter called the Buyer, WITNESSETH:

First—In consideration of one dollar ($1.00) paid to the seller by the buyer, at the time of signing this instrument, the receipt whereof is hereby acknowledged, and of the agreements hereinafter contained on the part of the buyer, the seller agrees to cultivate and complete the cultivation of about 20 acres of land now planted in hops, during the year 1947, consisting of 20 acres planted in cluster hops, and on the following described real estate, to-wit: situate about 2 miles south of Woodburn and about one-

half mile east of the Pacific Highway in Marion County, State of Oregon, and to harvest, cure and bale the hops grown thereon in said year 1947 in a careful and husbandmanlike manner, and the seller does hereby bargain and sell, and upon ten days' notice in writing therefor, agrees to deliver and to cause to be delivered to the buyer, not later than the thirty-first day of October of said year f.o.b. cars or in warehouse at Mt. Angel, Oregon, free from all liens and encumbrances of any kind and nature entire crop estimated at—twenty thousand—thousand pounds (20,000 lbs.) of Cluster hops grown on said premises, and in bales weighing not less than 185 pounds and not more than 210 pounds each, in new 24 ounce baling cloth (5 pounds tare per bale to be allowed); that such hops shall not be the product of the first year's planting, and not affected by spraying or mold, but shall be of prime quality, in sound condition, good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition. The buyer under and by this contract shall have the preference of selection, both as to quantity and quality over all other persons who may hereafter make contracts in relation to hops produced from said farm, and said buyer, for the purpose of examining and inspecting the same, may, at any time, and until the full performance of this agreement, have free access to the above described premises, or any other premises where said hops may be.

The price to be paid for the hops to be delivered

shall be the Grower's market price for the kind and quality of hops delivered containing eight (8%) per cent of leaves and stems and six (6%) per cent, or more, of seeds; the said Grower's market price may be selected by the Seller on any day between August 18, 1947 and October 1, 1947, both dates inclusive, and the Seller must notify the Buyer in writing of his selection on the day he selects. If the Seller does not select and notify then the Grower's market price of October 1, 1947 shall constitute the price for such hops, however, the Buyer agrees that the minimum price for the kind and quality of hops described herein and to be delivered under the terms of this contract shall be eighty-five (85c) cents per pound.

It is further understood and agreed that in the event the leaf and stem content be less than eight (8%) per cent, then the minimum price, or the market price as selected and agreed upon, will be increased one (1c) cent per pound for each one (1%) per cent reduction in leaf and stem content below eight (8%) per cent; and in the event the leaf and stem content exceeds eight (8%) per cent, then the minimum price, or the market price as selected and agreed upon, will be reduced one (1c) cent per pound for each one (1%) per cent increase of leaf and stem content to and including ten (10%) per cent.

The determination of the leaf and stem content, as aforesaid, shall be on the basis of an analysis made by the Oregon State Department of Agriculture, or by an authorized governmental agency.

It is also understood and agreed that in the event the hops covered by this contract contain over three (3%) per cent and under six (6%) per cent seed content, then the minimum price or the market price as selected and agreed upon, will be increased five (5c) cents per pound; and in the event the seed content be less than three (3%) per cent, then the minimum price, or the market price as selected and agreed upon, will be increased ten (10c) cents per pound.

The determination of the seed content, as aforesaid, shall be on the basis of an analysis made by the Oregon State Department of Agriculture, or by an authorized governmental agency.

Second—The buyer does hereby purchase the above described quantity of said hops and agrees to pay therefor by check, draft, or in lawful money of the United States of America, on the delivery thereof and acceptance by the buyer, and within the time and conditions herein provided, the price or prices as aforestated for each pound thereof which shall be delivered to and accepted by the buyer, who is to have the right to inspect the same before acceptance, and to accept any part less than the whole of the hops so bargained for, should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and tendered for acceptance be less than the amount herein bargained and sold; and upon the said buyer giving said notice to deliver as herein fixed tendering

to the seller the full amount of the purchase price thereof in lawful money, after deducting any advances made and interest thereon, the title and ownership and the right to the immediate possession of the said hops shall at once vest and be in the said buyer. In order to enable the seller to produce and harvest said crop and put the same in the condition herein agreed, the buyer will advance and loan to the seller such sums of money as may be required by the seller to defray the necessary expenses of cultivating and picking such hops, and of harvesting and curing the same and for such purposes only, not to exceed, however, twenty (20c) cents for each pound of hops herein bargained and sold and which may be grown on said lands, such advances to bear interest at the rate of no per cent per annum. Said advances to be paid in the following manner:

20 cents per pound or $4,000.00 on or about September 1, 1947;

provided, such sums are actually required for the cultivation, picking, drying and baling of said hops, and that, if before, at, or during the time of picking such hops, they are not in such condition so as to produce the quality of hops called for under the terms of his agreement, then in such event, the buyer shall be discharged from any obligation to make any advances or further advances, and from the obligation to receive the whole or part of said hops; and that this instrument shall then stand and be in force as a chattel mortgage upon the whole of

said hop crop for any advances which shall have been made, or may be made, and interest thereon.

Third—The said parties hereto further agree that as soon as the picking of the said hops is commenced the seller shall insure his hop houses on said premises and the entire crop of hops growing thereon against damage by fire for the full market value thereof and until the delivery under this contract, such insurance to be placed in only good solvent fire insurance companies. The policy thereon shall provide that the loss, if any, shall be paid to the buyer; but if the seller fails to procure such insurance or to pay for the same, the buyer shall have the right to procure such insurance in his own name, or in that of the seller at the buyer's option at any time after commencement of picking. The seller agrees to repay to the buyer at the time of delivery all premiums on such insurance with interest at the rate of 6 per cent per annum.

Fourth—All sums of money to be advanced under the terms of this contract are payable only at the office of the buyer in Salem, Oregon, upon ten days' written request and notice by the seller to the buyer therefor; such money may be forwarded either in cash or by check or draft by mail, or express, at the seller's risk and expense. It is further agreed between the parties hereto that the times when the said moneys shall be advanced, and when the said hops shall be delivered pursuant to this contract, are of the essence of this contract, and that failure upon

the part of the buyer to advance said money at said time, the seller not then being in default, shall give the seller the right to rescind the contract at his option, and the failure upon the part of the seller to deliver the hops within the time and in the condition and of the quality provided for by this contract, the buyer not then being in default, shall give the buyer the right to rescind the contract at his option.

Fifth—The parties hereto further agree that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages.

Sixth—That for and in consideration of the said 20 cents per pound, not exceeding in all the sum of four thousand and no/100—Dollars, hereinbefore agreed to be advanced by the buyer, and in consideration of the faithful performance of the said contract by the seller and for the payment of said liquidated damages, the seller does hereby bargain, sell, transfer, set over and mortgage unto the said buyer, the entire crop of hops growing and raised upon the premises above described in the year 19—,

to secure unto the said buyer the repayment of said advances and interest and the said liquidated damages upon the demand of said buyer, or in case the said seller shall part with the possession of any of said hops, or remove or undertake to remove any thereof, out of said Marion County, or suffer the same to be attached or levied upon by any creditor of said seller, or should bankruptcy proceedings be instituted by, or against, the seller, then the said buyer may enter upon any premises where the said hops may be found and take immediate possession thereof, and upon giving ten days' written notice to the seller of his intention to do so, may sell the same at public or private sale, and out of the proceeds thereof retain sufficient to repay said advances and the said liquidated damages and the costs of the said sale, and the balance, if any there be, pay over to the said seller or his representatives.

Seventh—This contract is not transferable by the said seller, and the said seller shall not sell, assign, or transfer his interest in this contract, or any part thereof, without the written consent of the said buyer, and that the said seller shall not at any time lease or sub-let the above described land, or any part thereof, or sell the same or any part thereof, and the said seller shall not at any time allow the said lands and premises, or any part thereof, to be encumbered by any mortgage, judgment, or other lien whatsoever, without the written consent of the said buyer, and that the said seller shall not in any way or manner jeopardize or inter-

fere with the delivery of the said hops, or any part thereof under this contract, and that in case the said seller shall violate any of the provisions and conditions in this contract on his part to be performed, or should bankruptcy proceedings be instituted by, or against, the seller, then and in that case the said buyer shall have the right at his option to rescind this contract, and immediately upon such recission, he, the said buyer shall have the right of action against the said seller for the recovery of any and all damages resulting on account thereof to the said buyer.

Eighth—It is agreed that all hops sold hereunder shall be within the grower's salable allotment in accordance with the provisions of the Federal Hop Marketing Agreement and Order, and if the quantity contracted hereunder shall exceed such allotment, this contract shall cover only the grower's salable allotment. The hops covered hereby are entitled to priority over any and all other hops produced from said property as regards both allotments and handling certificates. If said hops are not allocated and handling certificates therefor are not available by October 15th prior to such final delivery date, then the time for taking delivery by the buyer shall be, and hereby is, extended for a reasonable time after such allotments are made and certification is available.

In witness whereof, the said parties hereto have set their hands the day and year first above written.

/s/ FRED GESCHWILL,
Seller.
HUGO V. LOEWI, INC.,
/s/ ROBERT OPPENHEIM, Pres.,
Buyer.

State of Oregon
County of Marion—ss.

On this nineteenth day of August, 1947, personally came before me, a Notary Public in and for said county, the within named Fred Gerchwill to me known to be the identical person described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein named.

Witness my hand and notarial seal this nineteenth day of August, 1947.

.....
Notary Public.

My commission expires

[Endorsed]: Filed March 16, 1948.

In the Circuit Court of the State of Oregon
for the County of Marion

PETITION FOR REMOVAL OF CAUSE TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

To the Circuit Court of the State of Oregon in and for the County of Marion:

The petition of Hugo V. Loewi, Inc., a corporation, defendant in the above entitled action, respectfully shows:

I.

The above entitled action has been brought in this County and is now pending therein.

II.

Said action is of a civil nature at law, of which the District Courts of the United States have original jurisdiction, in that the suit is one to recover damages alleged to have been sustained by the plaintiff as the result of an alleged breach of contract on the part of the defendant.

III.

That petitioner appears herein specially and solely for the purpose of removing said cause to the United States District Court in and for the District of Oregon, upon the ground and for the reason that the controversy in said action is between citizens of different states, in that your petitioner,

Hugo V. Loewi, Inc., was at the time of commencement of this action and still is a corporation created and existing under and by virtue of the laws of the State of New York, and was then and still is a resident and citizen of said State of New York and not a resident or citizen of the State of Oregon, whereas the said plaintiff was at the time of commencement of this action and still is, a citizen of the State of Oregon, residing in Marion County in said State.

IV.

That the amount in controversy at the time of the commencement of this action and at the present time exceeds the sum of $3,000.00, exclusive of interest and costs.

V.

That the time for your petitioner, as defendant in this action, to move, answer or plead to the complaint in said action has not expired and will not so expire until the twenty-sixth day of March, 1948.

VI.

Petitioner herewith presents a good and sufficient bond, as provided by statute, that it will enter in such District Court of the United States for the District of Oregon within thirty days from the filing of this petition, a certified copy of the record in this action, and for the payment of all costs which may be awarded by said Court if the said District Court shall hold that this action was wrongfully or improperly removed thereto.

WHEREFORE, petitioner prays that this Court

proceed no further herein, except to make an order of removal and to accept the said bond, and to cause the record herein to be removed into the District Court of the United States for the District of Oregon.

HUGO V. LOEWI, INC.,
a corporation.

By /s/ ROBERT M. KERR,
Its Attorney.

State of Oregon
County of Multnomah—ss.

I, Robert M. Kerr, being first duly sworn, depose and say:

That I am one of the attorneys for the defendant in the above entitled cause, the petitioner herein; that I have read the foregoing petition and that I believe it to be true; that said petitioner is absent and is a non-resident of the State of Oregon and County of Marion in which said suit is brought, and that I make this affidavit for the reason that petitioner is absent from and is a non-resident of the said County of Marion in which said action is brought.

/s/ ROBERT M. KERR.

Subscribed and sworn to before me this twenty-fifth day of March, 1948.

[Seal] /s/ ALBERT L. NELSON,
Notary Public for Oregon.

My commission expires 12/30/50.

In the Circuit Court of the State of Oregon
for the County of Marion

No. 34863

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,
a corporation,

Defendant.

ORDER OF REMOVAL

This cause coming on for hearing upon petition of Hugh V. Loewi, Inc., a corporation, the defendant in the above entitled cause, for an order removing this cause to the District Court of the United States for the District of Oregon, and it appearing to this Court that the defendant has filed its petition for such removal in due form and within the required time and that the defendant has filed its bond duly conditioned as provided by law, and it being shown to the Court that the notice required by law of the filing of said bond and petition, had prior to the filing thereof been served upon the plaintiff herein, which notice the Court finds was sufficient and in accordance with the requirements of the statutes, and it appearing to this Court that this is a proper cause for removal to said District Court of the United States, this Court does now hereby accept and approve said bond and said petition and does order this cause to be removed to the District Court

of the United States for the District of Oregon, pursuant to Sections 28 and 29 of the Judicial Code of the United States, and that all other proceedings of this Court be stayed, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Dated this twenty-sixth day of March, 1948.

/s/ E. M. PAGE,
Judge of the Circuit Court.

[Endorsed]: Filed March 26, 1948.

In the Circuit Court of the State of Oregon
for the County of Marion

NOTICE OF INTENTION TO FILE PETITION AND BOND FOR REMOVAL OF CAUSE

To: Maguire, Shields & Morrison, attorneys for plaintiff.

Please take notice that Hugo V. Loewi, Inc., a corporation, the defendant in the above entitled cause, will on the twenty-sixth day of March, 1948, at 9:30 o'clock in the forenoon of that day, file in the Circuit Court of the State of Oregon for the County of Marion in said State, and in the Clerk's office thereof, in which said action is now pending, its petition and bond for removal of the said cause from the said Court to the District Court of the United States for the District of Oregon, and that

on the twenty-sixth day of March, 1948 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, said petition and bond will be called up for hearing and disposition before the above Court in which this action is pending, at which time and place you may be present if you so elect.

Copies of said petition and bond are herewith served upon you.

Dated this twenty-fifth day of March, 1948.

KERR & HILL,
Attorneys for Defendant
Petitioner.

[Endorsed]: Filed March 26, 1948.

State of Oregon,
County of Marion—ss.

I, H. A. Judd, County Clerk of the above named County and State and ex-officio Clerk of the Circuit Court of the County of Marion, State of Oregon, do hereby certify that the foregoing copy of Complaint, Summons, Notice of Intention to File Petition and Bond for Removal; Petition for Removal and Bond for Removal, and Order of Removal in re: Fred Geschwill vs. Hugh V. Loewi, Inc., a corporation, No. 34863 has been by me compared with the original and that it is a correct transcript therefrom and of the whole of such original record or file as the same appears of record or on file in my office and in my care and custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, this fifth day of April, A. D. 1948.

[Seal] H. A. JUDD,
County Clerk,

By /s/ R. G. HOWARD,
Deputy.

[Endorsed]: Filed April 23, 1948.

In the District Court of the United States
for the District of Oregon

Civil Action No. 4082

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a Corporation,

Defendant.

MOTION TO DISMISS, TO STRIKE, AND FOR MORE DEFINITE STATEMENT

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

2. In the event the action is not dismissed, that the Court order stricken from the complaint now

on file herein, as redundant, immaterial and impertinent, each of the following:

(a) In paragraph IV, page 2, lines 2 and 3, the words "defendant inspected plaintiff's said Cluster hops growing on said farm".

(b) In paragraph V, page 2, lines 11 to 13, the words "except to the extent that such performance was waived by defendant, or prevented by its acts and conduct as herein alleged".

(c) All of paragraph VI on page 2.

(d) All of paragraph IX on page 3, except only the words, in lines 22 to 24, "on or about October 30, 1947, defendant refused to pay for plaintiff's said hops on the stated grounds that they were badly blighted".

(e) In the event the matter specified in (d) is not ordered stricken, that the Court order stricken from paragraph IX on page 3 the words, in lines 24 to 28, "Said hops were not any more badly blighted than when defendant inspected and contracted to buy the same, or than when defendant subsequently inspected them from time to time and instructed plaintiff to continue picking the same".

3. In the event the matter specified in (b) applicable to paragraph V on page 2 of the complaint is not ordered stricken, then the defendant moves that the plaintiff be ordered to make a more definite statement of the matters set forth in said paragraph V, in the following respects:

(a) The extent to which the plaintiff did not duly perform the terms and conditions of the contract on his part to be performed.

(b) In what manner such performance was waived by the defendant.

(c) In what manner such performance was prevented by the defendant.

(d) The alleged acts or conduct of the defendant referred to in said paragraph V.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,
Attorneys for Defendant.

NOTICE OF MOTION

To: Roy F. Shields, William E. Dougherty, Maguire, Shields, Morrison & Bailey, Attorneys for Plaintiff:

Please take notice that the undersigned will bring the foregoing motion on for hearing before this Court on the 10th day of May, 1948, at 10 o'clock a.m., or as soon thereafter as counsel may be heard.

/s/ ROBERT M. KERR,
Of Attorneys for Defendant.

Service of Copy acknowledged.

[Endorsed]: Filed April 28, 1948.

In the District Court of the United States
for the District of Oregon

Civ. No. 4082

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a Corporation,

Defendant.

Civ. No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a Corporation,

Defendant.

MEMORANDUM

The motions of defendants are provisionally denied. The legal questions raised by the motions are reserved to the pre-trial or trial.

Dated May 21, 1948.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 21, 1948.

In the District Court of the United States
for the District of Oregon

Civil Action No. 4082

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a Corporation,

Defendant.

REPLY TO COUNTERCLAIM

Now comes plaintiff and for reply to defendant's counterclaim denies each and every allegation, thing and matter contained therein and the whole thereof except insofar as admitted in plaintiff's complaint.

ROY F. SHIELDS,

/s/ WILLIAM E. DOUGHERTY,
MAGUIRE, SHIELDS,
MORRISON & BAILEY,
Attorneys for Plaintiff.

Due Service of Copy acknowledged.

[Endorsed]: Filed June 21, 1948.

[Title of District Court and Cause.]

AMENDED ANSWER

For answer to the complaint of the plaintiff in the above-entitled cause, the defendant says:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

1. Defendant admits the allegations in Paragraphs I and II.

2. Answering Paragraph III, defendant admits all the allegations therein except that defendant denies that defendant has been or is transacting in the State of Oregon the business of selling hops.

3. Answering Paragraph IV, defendant admits that on or about August 18, 1947, defendant entered into a contract in writing with the plaintiff, a copy of which contract is attached to the complaint as Exhibit "A" thereof. Defendant denies every other allegation in said Paragraph IV.

4. Defendant denies all the allegations of Paragraph V except only that defendant admits that pursuant to the aforesaid contract defendant did loan and advance to plaintiff $4000.00.

5. Defendant denies all the allegations of Paragraph VI.

6. Defendant denies all the allegations of Paragraph VII, except that the defendant admits that the said hops were placed in storage by the plaintiff, for his own account, and that, with the defendant's assent, they were there made available to the defendant for inspection. The defendant admits that it sampled and weighed the hops.

7. Answering Paragraph VIII, defendant admits the allegations thereof except that defendant denies that the hops therein referred to were inspected by the U. S. Department of Agriculture and denies that the sales price for said hops was 85 cents per pound or that the contract sales price therefor was 95 cents per pound, or any other sum.

8. Answering Paragraph IX, defendant denies all the allegations therein except only that defendant admits that on or about October 30, 1947, defendant did reject and refuse to pay for the hops tendered by plaintiff.

9. Defendant denies all the allegations in Paragraph X except only that defendant admits that the contract therein referred to purported to constitute a lien on the hops.

10. Defendant denies all the allegations in Paragraph XI except only that defendant admits that defendant did pay to plaintiff the sum of $4000.00.

11. Answering Paragraph XII, defendant admits that on several occasions plaintiff demanded

that defendant pay to plaintiff a sum of money for the aforesaid hops, and that defendant refused to do so, but defendant denies each and all of the other allegations in said Paragraph XII.

12. Defendant denies each and every allegation in the complaint not herein admitted or specifically denied.

Third Defense

Plaintiff failed to perform the provisions of the contract referred to in plaintiff's complaint, being conditions precedent on plaintiff's part to be performed, in that plaintiff failed to harvest, cure and bale in a careful and husbandlike manner the hops grown in the year 1947 on the acreage described in said contract, and that the 1947 crop hops produced by plaintiff on said premises and tendered to the defendant under said contract were affected by mold, were not of prime quality, were not in sound condition, were not of good color, were not fully matured, were not cleanly picked, and were not in good order and condition, and that the plaintiff wholly failed to deliver or tender to defendant, or to appropriate unconditionally to the said contract, with or without, defendant's assent, hops grown in the year 1947 of the type, quality, grade and condition required by the said contract.

Counterclaim

Plaintiff owes to defendant $4000.00 for money lent and advanced to plaintiff by defendant, on or about August 18, 1947, as an advance to defray

necessary production costs under the contract referred to in plaintiff's complaint herein. Defendant thereafter and in the month of October, 1947, notified plaintiff that the hops tendered to defendant by plaintiff under said contract were not of the grade, quality or condition called for by said contract and therefore were not accepted by the defendant, and defendant thereupon demanded of plaintiff the repayment of said $4000.00, but plaintiff has wholly failed and refused to pay to defendant any part of said advance and loan and no part thereof has been repaid to defendant.

Wherefore defendant prays judgment that the complaint of plaintiff be dismissed, and for judgment against the plaintiff in the sum of $4000.00 together with interest thereon from October 30, 1947, and defendant's costs.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Defendant.

United States of America,
District of Oregon—ss.

I Stuart W. Hill, being first duly sworn, depose and say: That I am one of the attorneys for the defendant in the above-entitled cause; that I have read the foregoing Amended Answer and believe it to be true; that said defendant is absent from and a non-resident of the District of Ore-

gon in which said cause is pending, and that I make this affidavit for that reason.

/s/ STUART W. HILL.

Subscribed and sworn to before me this 22nd day of January, 1949.

[Seal] /s/ R. M. KERR,
Notary Public for Oregon.

My commission expires: February 5, 1951.

Service of Copy acknowledged.

[Endorsed]: Filed January 25, 1949.

In the District Court of the United States
for the District of Oregon
Civil No. 4082

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

Civil No. 4083

KILIAN W. SMITH,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

MEMORANDUM OF DECISION

The ground for decision in the Nusom case, filed today, applies to these cases. In the Geschwill case the contract was made after the hops were known to be mildewed. In the Smith case the grower asked for directions, and was encouraged by the buyer to go further into buyer's debt, after both parties knew the hops were mildewed.

Under these circumstances, the buyer cannot now reject the hops on the ground that the hops do not comply with the contract. This would be abhorrent to equity.

Dated June 15, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 15, 1949.

In the United States District Court for the District of Oregon

Civil Action No. 4082

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was tried at Portland, Oregon, before the undersigned Judge of the above-entitled Court. Plaintiff appeared in person and by Randall B. Kester and William E. Dougherty of his attorneys, and defendant appeared by Robert M. Kerr and Stuart W. Hill, its attorneys. Both parties waived jury trial, and the issues were tried by the Court.

It appearing that this action involved common questions of law and fact with the actions of Kilian W. Smith, plaintiff, vs. Hugo V. Loewi, Inc., defendant, Civil Action No. 4083, and O. L. Wellman, plaintiff, vs. John I. Haas, Inc., defendant, Civil Action No. 4158, the parties consented and the Court ordered that said three actions be tried jointly and that the evidence in any of the actions should be deemed to have been taken and heard and should be considered in each of the actions so tried

together to the extent that such evidence was pertinent, material and relevant.

The joint trial of the three actions began on January 25, 1949, and concluded on February 5, 1949. All parties to said actions offered evidence. The Court heard arguments of counsel for the respective parties, and the Court considered memorandum briefs on the facts and the law submitted by counsel for the respective parties.

The Court, being fully advised, having considered the evidence, arguments and briefs, and having handed down his memorandum of decision, now hereby makes the following

Findings of Fact

1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of New York.

2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000; and this Court has jurisdiction of the subject-matter, the parties and the cause of action.

3. On or about August 18, 1947, plaintiff as seller and defendant as buyer entered into the written agreement received in evidence herein. By said agreement plaintiff contracted to sell and defendant contracted to buy the entire crop of cluster hops grown by plaintiff in 1947 on certain premises

in Marion County, Oregon. Pursuant to said contract plaintiff cultivated and completed the cultivation of said premises and duly harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner. (As part of the same transaction defendant also contracted to buy a certain crop of fuggle hops from plaintiff, but said fuggle hops were duly paid for and there is no controversy here on that matter.)

4. In 1947 there was, as defendant knew, widespread mildew in hop yards in the Willamette Valley in Oregon. The parties entered into said cluster hop agreement shortly before picking time, and the hops which defendant contracted to buy were then formed and in existence on the vines. Defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled. Such mildew in said hops did not become more prevalent or pronounced after said agreement was entered into.

5. By said agreement defendant contracted to make an advance payment to plaintiff of $4,000 in order to enable plaintiff to defray the necessary expenses of cultivating and picking said hops and of harvesting and curing the same. The agreement provided that defendant would have a prior lien upon said hop crop for such advance payment, and the defendant duly caused said agreement to be filed as a chattel mortgage in the records of Marion County, Oregon.

6. Said agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defendant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's said crop of cluster hops and that said crop when picked and baled would in normal course show such mildew. Defendant elected to and did make plaintiff said advance. Said mildew in said crop did not thereafter become more pronounced or prevalent.

7. Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state and delivered the same in warehouse at the place and within the time agreed upon in said contract. In September, 1947, after said hops had been picked, dried, cured and baled as aforesaid, plaintiff, with the assent of defendant, delivered at Schwab's warehouse in Mt. Angel, Oregon, all of said hops and set same aside for defendant. Thereafter, defendant inspected, sampled, marked and weighed said hops at that warehouse. The bales of hops constituting said crop were identified, segregated and appropriated to the contract. Plaintiff duly performed all of the terms and conditions of the agreement between the parties on his part to be performed.

8. Said hops so weighed in by defendant con-

sisted of 130 bales, and had a total net weight, as determined by defendant, of 26,536 pounds. Said hops contained eight per cent. leaves and stems and less than three per cent. seed content, as determined by an authorized governmental agency in accordance with said agreement.

9. Said agreement provided that the price to be paid for the hops to be delivered would be the grower's market price for the kind and quality of hops delivered containing eight per cent. of leaves and stems and six per cent. or more of seeds, and in the event the seed content was less than three per cent. then the price would be increased ten cents per pound. Pursuant to said contract on or about September 17, 1947, plaintiff selected the price of 85 cents a pound which was then said grower's market price for such hops containing six per cent. or more of seed content, and plaintiff duly notified defendant in writing of such selection. Since the seed content was less than three per cent., the contract price for said hops was 95 cents per pound. The total contract price was $25,209.20.

10. Upon delivery as aforesaid plaintiff duly tendered said entire crop of hops to defendant in warehouse at the place specified in said agreement, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part there-

of except for said partial advance payment. Said hops, as defendant knew, continued to be held by the warehouseman until disposed of as hereinafter stated. Defendant at all times knew it could obtain said hops upon payment of the balance of said purchase price.

11. On or about October 30, 1947, defendant rejected and refused to pay for said hop crop tendered by plaintiff. On several occasions after said balance became due and owing, plaintiff duly made demand on defendant for the payment thereof. Defendant refused to pay for said hop crop on the particular ground that said hops were blighted and on no other specific ground. By the term "blighted" it was meant that the hops showed some mildew effect as stated above. At the trial defendant advanced the same specific objection to the hops. Upon the facts the claimed defect was not material. Said crop of hops was not any more blighted or mildewed than when defendant contracted to buy the same or when defendant elected to make the advance payment as aforesaid. Said hops when tendered were merchantable.

12. Plaintiff delivered the identical hop crop which defendant contracted to buy. Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid. Said

hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions. Defendant found that a portion of said crop was acceptable, and in fact the entire crop was substantially of the same quality as the part thereof which defendant found acceptable. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said agreement.

13. Hops are of a perishable nature; there had been a material decline in the general market price and demand for 1947 Oregon cluster hops; and the hops here involved could not readily be resold. After this action was instituted, and after defendant had been in default in the payment of said price an unreasonable time, plaintiff found that said hops could be resold for a fair price. Said resale was made pursuant to the stipulation between the parties of March 30, 1948. By said stipulation, upon certain conditions imposed by defendant, which conditions were met, defendant did not object to the resale and released the chattel mortgage. Ninety bales were resold on April 1, 1948, for $7,027.13 and the remaining forty bales were resold on April 16, 1948, for $3,090.38, and said prices were the best prices then obtainable for said hops. Of the total sum of $10,117.51 plaintiff received $6,117.51, and $4,000.00 was held under the stipulation by the stakeholder for the account of defendant pending this litigation. Said resale pro-

ceeds were properly credited against the sum due plaintiff from defendant, and the then remaining balance was:

Contract	$25,209.20
Advance payment	4,000.00
Amount due plaintiff from defendant on Oct. 31, 1947	$21,209.20
Interest thereon to April 1, 1948, at 6% per annum	528.49
Balance	$21,737.69
Resale proceeds received by plaintiff	3,027.13
	$18,710.56
Interest thereon to April 16, 1948, at 6% per annum	46.00
Balance	$18,756.56
Resale proceeds received by plaintiff	3,090.38
Balance on April 16, 1948	$15,666.18

No part of said balance has been paid.

Upon the foregoing findings of fact the Court has determined and does hereby make the following

Conclusions of Law

1. Plaintiff substantially performed all of the terms and conditions of the agreement between the parties on his part to be performed.

2. The property in said cluster hops passed to defendant.

3. Defendant became obligated to pay plaintiff on or before October 31, 1947, the sum of $21,209.20, being the contract price of $25,209.20, less the advance payment of $4,000.00.

4. Defendant wrongfully refused to and did not perform its obligation under said contract.

5. The resale of said hops was proper, and the proceeds therefrom received by plaintiff are properly credited against the sum then due from defendant.

6. The measure of plaintiff's recovery upon the facts here is, under Oregon law, the difference between the amount due under said contract and the amount realized from said resale.

7. Said advance payment having been credited against the amount due from defendant, defendant should take nothing under its counterclaim.

8. Plaintiff should have judgment against defendant for $15,666.18, with interest at the rate of six per cent. per annum from April 16, 1948, until the same be paid in full, and with costs and disbursements; and judgment will be entered accordingly.

Dated this 22nd day of September, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Proposed form submitted by:

/s/ WILLIAM E. DOUGHERTY,

/s/ RANDALL B. KESTER,

Of Attorneys for Plaintiff.

Service of proposed form admitted at Portland, Oregon, on July 12, 1949.

KERR & HILL,

By /s/ GERALDINE RIST,

Of Attorneys for Defendant.

[Endorsed]: Filed September 22, 1949.

In the United States District Court for the District of Oregon

Civil Action No. 4082

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC.,

Defendant.

JUDGMENT

The Court having found the facts in this cause specially, stated separately its conclusions of law thereon, and directed the entry of this, the appropriate judgment, it is therefore

Considered, Ordered and Adjudged that plain-

tiff have and recover from the defendant the sum of $15,666.18, with interest thereon at the rate of six per cent per annum from April 16, 1948, and plaintiff's costs herein taxed at $210.75.

Dated this 30th day of September, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed September 30, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Hugo V. Loewi, Inc., a corporation, defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of September, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant, Hugo V. Loewi, Inc., a Corporation.

[Endorsed]: Filed October 10, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents, that we, Hugo V. Loewi, Inc., a New York corporation, as principal, and National Surety Corporation, a New York corporation, as surety, are held and firmly bound unto Fred Geschwill in the full and just sum of $20,000.00, to be paid to the said Fred Geschwill or his certain attorney, executor, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of October, 1949.

Whereas, lately at a session of the District Court of the United States for the District of Oregon in a suit pending in said Court, between Fred Geschwill, as plaintiff, and Hugo V. Loewi, Inc., a New York corporation, as defendant, a judgment was rendered against the said defendant and the said defendant, Hugo V. Loewi, Inc., a New York corporation, having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, California.

Now, the condition of the above obligation is such that if the said defendant, Hugo V. Loewi, Inc., a New York corporation, shall prosecute its

appeal to effect, and satisfy the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award if said Hugo V. Loewi, Inc., a New York corporation, fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

HUGO V. LOEWI, INC.,
A New York Corporation,

[Seal] By /s/ ROBERT M. KERR,
Its Attorney in Fact,
Principal.

NATIONAL SURETY CORPORATION, a New York corporation,

[Seal] By /s/ W. B. GILHAM,
Its Attorney in Fact,
Surety.

Countersigned:

PHIL GROSSMAYER CO.,
Resident Agents,

By /s/ W. B. GILHAM.

Form of bond and sufficiency of surety approved, this 10th day of October, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

POWER OF ATTORNEY

Know All Men by These Presents, that Hugo V. Loewi, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, has made, constituted, and appointed, and by these presents does make, constitute, and appoint Robert M. Kerr, of Portland, in the State of Oregon, to be its true and lawful attorney, for it and in its name, place, and stead, to enter into, make, and execute, in an action pending in the District Court of the United States for the District of Oregon, entitled Fred Geschwill, plaintiff, v. Hugo V. Loewi, Inc., a corporation, defendant, Civil Action No. 4082, a supersedeas bond, as principal, in the sum of $20,000.00 or such other amount as may be necessary to comply with the order of the said Court fixing the amount of such bond, and to sign, seal, acknowledge, and deliver the same, in contemplation of an appeal from the judgment entered in said action on the 30th day of September, 1949.

In Witness Whereof, the said corporation has caused these presents to be signed by its officer thereunto duly authorized, and its corporate seal to be hereunto affixed, this 6th day of October, 1949.

HUGO V. LOEWI, INC.,

[Seal] By /s/ ROBERT OPPENHEIM,
Its President.

Attest:

/s/ ROBERT OPPENHEIM, JR.,
Secretary.

State of New York,
County of .....—ss.

Personally appeared Robert Oppenheim, President, of said corporation, signer and sealer of the above instrument, he being thereunto duly authorized by the corporation above named, and acknowledged the same to be his free act and deed, and the free act and deed of said corporation, before me, this 6th day of October, 1949.

[Seal] /s/ ARNOLD DeSTEFANO,
Notary Public,
State of New York.

My Commission Expires March 30, 1951.

[Endorsed]: Filed October 10, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing appeal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises,

It Is Ordered that the time within which the record on appeal may be filed in the Court of Ap-

peals and the appeal docketed in the Court of Appeals be and the same hereby is extended to and including the 17th day of December, 1949.

Dated this 18th day of November, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Nov. 21, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

The defendant and appellant, Hugo V. Loewi, Inc., proposes on its appeal to the Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The court erred in finding that by the agreement on August 18, 1947, the plaintiff contracted to sell and the defendant contracted to buy the entire crop of cluster hops grown by the plaintiff in 1947 on his premises in Marion County, Oregon, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

2. The court erred in finding that pursuant to said contract the plaintiff duly harvested, cured, and baled said hops grown thereon in said year in a careful and husbandlike manner, and in basing

the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

3. The court erred in finding that the defendant knew that said crop of hops showed some mildew at the time said contract was entered into, and knew that said crop would in normal course show such mildew when picked and baled, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

4. The court erred in finding that such mildew in said hops did not become more prevalent or pronounced after said agreement was signed, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

5. The court erred in finding that before and at the time of picking, the defendant knew that there was mildew in the plaintiff's said crop of cluster hops and that said crop when picked and baled would in normal course show such mildew, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

6. The court erred in finding that the mildew in said crop did not become more pronounced or prevalent after the defendant made the advance to the plaintiff, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

7. The court erred in finding that the plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

8. The court erred in finding that the plaintiff, with the assent of the defendant, delivered his baled cluster hops to the warehouse and set them aside for the defendant, and appropriated them to the contract, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

9. The court erred in finding that the plaintiff duly performed all of the terms and conditions of the agreement which he was required to perform by the said contract, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

10. The court erred in finding that the defendant at all times knew it could obtain said hops upon payment of the balance of the purchase price, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

11. The court erred in finding that the defendant refused to pay for said crop of hops on the ground that they were blighted and on no other specific ground, and in basing the judgment thereon,

such finding being clearly erroneous and unsupported by substantial evidence.

12. The court erred in finding that by the term "blighted" it was meant that the hops showed some mildew effect, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

13. The court erred in finding that at the trial the defendant advanced the same specific objection to the hops, that is, that they were blighted, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

14. The court erred in finding that upon the facts the claimed defect was not material, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

15. The court erred in finding that said crop of hops, at the time defendant rejected them, was not any more blighted or mildewed than when defendant contracted to buy the same or when defendant elected to make the advance payment, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

16. The court erred in finding that said cluster hops, when tendered to the defendant, were merchantable, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

17. The court erred in finding that the plaintiff delivered the identical hop crop which the defendant contracted to buy, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

18. The court erred in finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

19. The court erred in finding that said hops were of substantially the average quality of Oregon cluster hops accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

20. The court erred in finding that the defendant found that a portion of said hop crop was acceptable, and that, in fact, the entire crop was substantially of the same quality as the part thereof which defendant found acceptable, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

21. The court erred in finding that said hops, upon tender and delivery, substantially conformed

to the quality provisions of the written agreement of August 18, 1947, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

22. The court erred in finding that there had been a material decline in the general market price and demand for 1947 Oregon cluster hops and that the hops here involved could not readily be resold, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

23. The court erred in finding that the defendant was in default in the payment of the purchase price of said hops and that $15,666.18 was due and owing from the defendant.

24. The court erred in deciding that the plaintiff substantially performed all of the terms and conditions of the agreement between the parties on his part to be performed.

25. The court erred in deciding that the property in said cluster hops passed to the defendant.

26. The court erred in deciding that the defendant became obligated to pay the plaintiff on or before October 31, 1947, the sum of $21,209.20, being the contract price of $25,209.20 less the advance payment of $4,000.00.

27. The court erred in deciding that the defendant wrongfully refused to and did not perform its obligation under said contract of August 18, 1947.

28. The court erred in deciding that the measure of the plaintiff's recovery upon the facts in this cause is, under the Oregon law, the difference between the amount claimed to be due under said contract and the amount realized from the resale of the plaintiff's hops.

29. The court erred in failing and refusing to apply the provision in said contract of August 18, 1947, which fixed and determined the measure of damages as the difference between the contract price of the hops the defendant was obligated to accept, and the market value thereof.

30. The court erred in deciding that defendant should take nothing under its counterclaim.

31. The court erred in deciding that the judgment against the defendant should include interest at the rate of six per cent per annum from April 16, 1948, to the date of judgment.

32. The court erred in failing and refusing to grant the motion to dismiss filed on behalf of the defendant.

33. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill: Did they have more or less mildew at other yards, generally?

Answer: My yard did not have as much as the other yards in general.

34. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill: In the hop itself, what is the substance that makes the hop useful for brewing beer?

Answer: They use what they call the lupulin.

35. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill: If mildew were to touch the outside petals and turn them reddish or orange colored, would that normally affect the lupulin on the inside of the hop?

Answer: Not if it is in the later season. I imagine if it is in the real early stage it wouldn't make no hop, but later on it don't affect it at all.

36. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill: What was the custom, generally, in the business with respect to whether weighing in was an acceptance of hops?

Answer: That was the custom; when they was weighed, when they went over the scale and there was nothing wrong with the hops.

37. The court erred in refusing to strike evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill: At that time, when they were

weighed in and the samples taken, did Mr. Fry or anyone representing Loewi say anything as to whether or not the hops were accepted at that time, or rejected, either one?

Answer: Well, I figured they was accepted when they weighed them.

38. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker: Is that lupulin what the hop is used for in making beer?

Answer: That is what I understand, the main property of it.

39. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker: What is the understanding in the hop trade generally as to what use of the hop is made in making beer? That is, insofar as it is common knowledge in the hop business.

Answer: It is my general understanding that the hop is used primarily for flavor and aroma.

40. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker: What portion of the hop does that aroma come from?

Answer: From the lupulin, primarily, as I understand.

41. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker: If there was an attack of downy mildew sufficient to discolor the petals, make some of the petals turn a slightly reddish tinge, but not enough to get inside the petals, would that ordinarily affect the lupulin quality?

Answer: I never thought so. That, again, is a very debatable question. As you know, we have 1,200 or 1,400 brewers in the United States or whatever it may be—I do not have the number. Brewmasters, of course, do not—they might use them or buy them even though they showed that discoloration.

42. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker: Even with some discoloration of the petals, the hop is usually considered marketable?

Answer: Yes, I would consider them so.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Defendant-Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the fore-

going copy of Statement of Points on which Defendant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 5, 1949.

STUART W. HILL,
Of Attorneys for Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Defendant, Hugo V. Loewi, Inc., hereby designates for inclusion in the record on appeal the following portions of the record, proceedings, and evidence:

1. Transcript on removal from the Circuit Court of the State of Oregon for the County of Marion.

2. Motion to dismiss, to strike, and for more definite statement.

3. Order reserving decision on motion.

4. Amended answer.

5. Reply to counterclaim.

6. Findings of fact and conclusions of law.

7. Memorandum of decision.

8. Judgment.

9. Notice of appeal.

10. Supersedeas bond.

11. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949.

12. Statement of points on which defendant intends to rely on appeal.

13. This designation of contents of record on appeal, and all counterdesignations or further designations.

14. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case.

15. The following exhibits:

(a) Plaintiff's exhibits having the following numbers: 5, 6-A, 6-B, 7, 8, 9, 10-A, 10-B, 10-C, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31-A, 31-B, 31-C, 31-D, 31-E, 31-F, 31-G, 31-H, 31-I, 31-J, 31-K, 31-L, 31-M, 31-N, 51.

(b) Defendant's exhibits having the following numbers: 1, 2, 3, 4, 32, 33, 35-A, 35-B, 35-C, 35-D, 35-E, 35-F, 35-G, 35-H, 35-I, 35-J, 37-A, 37-B, 37-C, 37-D, 37-F, 38-A, 38-B, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49-A, 49-B, 49-C, 49-D, 49-E, 50-A, 50-B, 50-C, 50-D, 50-E.

(c) Exhibits not designated as plaintiff's or defendant's, having the following numbers: 34-A, 34-B, 34-C, 34-D, 34-E, 34-F, 34-G, 34-H, 34-I, 34-J, 34-K, 36-A, 36-B, 36-C, 36-D, 36-E.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Defendant-Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of Contents of Record on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated ....., 1949.

STUART W. HILL,

Of Attorneys for Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF EXHIBITS

On motion of the defendant and appellant, Hugo V. Loewi, Inc.,

It Is Ordered That the Clerk of this court forward to the United States Court of Appeals for the Ninth Circuit, in connection with the appeal of the above-entitled cause, all of the original documentary exhibits in accordance with the usual practice of this court in regard to the safekeeping and transportation of original documentary exhibits.

It Is Further Ordered That the Clerk of this court be and he hereby is authorized to permit Kerr & Hill, attorneys of record for the defendant and appellant, to withdraw all of the other exhibits in this cause from the office of the Clerk of this court in order that they may be shipped to the United States Court of Appeals for the Ninth Circuit.

Dated this 7th day of December, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed December 7, 1949.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL

Fred Geschwill, plaintiff and appellee, hereby designates the following additional portions of the record, proceedings and evidence in this cause to be included in the record on appeal herein to the United States Court of Appeals for the Ninth Circuit:

1. Plaintiff's Exhibit 28.

2. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records on appeal to the United States Court of Appeals for the Ninth Circuit from the United States District Court for the District of Oregon in Civil Action No. 4083, Kilian Smith, plaintiff-appellee, vs. Hugo V. Loewi, Inc., a corporation, defendant-appellant, and in Civil Action No. 4158, O. L. Wellman, plaintiff-appellee, vs. John I. Haas, Inc., a corporation, defendant-appellant. (Those two actions involve common questions of law and fact with this action; and on trial the parties to all three actions consented, and the District Court ordered, that the three actions be tried jointly and that the evidence in any of said actions should be deemed to have been taken and heard and should be considered in each of the actions to tried together to the extent that such evidence was pertinent, material and relevant.)

Dated at Portland, Oregon, this 14th day of December, 1949.

ROY F. SHIELDS,

/s/ RANDALL B. KESTER,

/s/ WILLIAM E. DOUGHERTY,

Of Attorneys for Plaintiff-Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed December 14, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing appeal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises:

It Is Ordered that the time within which the record on appeal may be filed in the Court of Appeals and the appeal docketed in the Court of Appeals be and the same hereby is extended to and including the 31st day of December, 1949.

Dated this 15th day of December, 1949.

/s/ CLAUDE McCOLLOCH,

U. S. District Judge.

[Endorsed]: Filed Dec. 15, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES

1948

Apr. 23—Filed Transcript on Removal from Marion County.

Apr. 28—Filed Motion to Dismiss, to Strike and for more Definite Statement.

May 10—Record of hearing on motion of deft. to dismiss complaint, to strike and for more definite statement argued & taken under advisement. McC.

May 21—Filed Memorandum. McC.

June 1—Filed Defts Answer to Fred Geschwill Ptffs complaint.

June 21—Filed reply to plntf. to counterclaim of defendant.

July 30—Filed memorandum opinion reserving motions of deft. to dismiss, to strike and to make more definite to time of pre-trial or trial. McC.

Dec. 13—Entered order setting for Pre-trial Conf. on Jan. 17, 1949. Fee.

Dec. 15—Entered order setting for trial on Jan. 25, 1949. McC.

1949

Jan. 17—Filed stipulation re depositions for plntf and deft.

1949

Jan. 17—Record of pre-trial conference. McC.

Jan. 20—Issued subpena and 10 copies to Atty. Hill.

Jan. 22—Filed deposition of Fred Geschwill.

Jan. 22—Filed deposition of James A. Byers, Lamont Fry & C. W. Paulus.

Jan. 24—Issued subpena & 6 copies to atty. Randall Kester.

Jan. 25—Filed amended answer.

Jan. 25—Record of trial before court. McC.

Jan. 26—Record of trial before court. McC.

Jan. 27—Record of trial before court. McC.

Feb. 3—Record of trial before court; arguments & order allowing ptff to Feb. 17 to submit brief & deft. to March 2, 1949. McC.

May 17—Filed deft's reply brief.

June 15—Filed memorandum of decision (for ptff). McC.

July 25—Entered order setting hearing in settlement of Findings of Fact & Conclusions of Law for Sept. 12, 1949. McC.

Sept. 7—Lodged Findings of Fact proposed by defendant.

Sept. 7—Filed objections to F of F & Con. of L proposed by ptff.

1949

Sept.19—Record of hearing on Findings of Fact & Conclusions of Law—argued & reserved. McC.

Sept.22—Filed & entered Findings of Fact & Conclusions of Law. McC.

Sept.30—Filed deft's objection to form of proposed judgment.

Sept.30—Filed & entered judgment for ptff for $15,666.18 with interest at 6% from April 16, 1948. McC.

Sept.30—Entered judgment in Lien Docket.

Oct. 8—Filed plaintiff's cost bill.

Oct. 10—Filed stipulation concerning amount of supersedeas bond.

Oct. 10—Filed & entered order fixing amount of supersedeas bond. McC.

Oct. 10—Filed notice of application for taxation of costs.

Oct. 10—Filed supersedeas bond.

Oct. 10—Filed notice of appeal by defendant.

Oct. 11—Mailed copy of notice of appeal to Roy F. Shields and William E. Dougherty.

Oct. 26—Filed stipulation for order granting leave to amend supersedeas bond.

1949

Oct. 26—Filed and entered order granting leave to amend supersedeas bond.

Nov. 15—Filed in duplicate transcript of testimony.

Nov. 18—Entered order extending time for filing record on appeal to December 17, 1949. McC.

Nov. 18—Filed motion on above order.

Nov. 18—Filed above order.

Dec. 5—Filed statement of points.

Dec. 5—Filed designation of contents of record.

Dec. 7—Filed and entered order for transmittal of exhibits. McC.

Dec. 14—Filed appellee's designation of record on appeal.

Dec. 15—Filed and entered order extending time to file appeal. McC.

United States District Court, District of Oregon

Civil No. 4082

FRED GESCHWILL,

Plaintiff,

vs.

HUGO V. LOEWI, INC., a corporation,

Defendant.

January 25, 1949

Before: Honorable Claude McColloch,
Judge.

Appearances:

RANDALL B. KESTER,

WILLIAM E. DOUGHERTY,

MAGUIRE, SHIELDS, MORRISON & BAILEY,

Of Attorneys for Plaintiff.

ROBERT M. KERR,

STUART W. HILL,

Of Attorneys for Defendant.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

FRED GESCHWILL

the Plaintiff herein, produced as a witness in his own behalf and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. State your name to the Court, please.

A. Fred Geschwill.

Q. You are the plaintiff in this case, Mr. Geschwill? A. Yes.

Q. Where do you reside, Mr. Geschwill?

A. Two miles southeast of Woodburn.

Q. You have a ranch there? A. Yes.

Q. Would you describe, in a general way, the ranch that you have now? How many acres have you got? A. I got 416 acres.

Q. How many acres do you have in hops?

A. At the present time I got 85 acres in hops.

Q. In 1947, which is the year involved in this case, how many acres did you have in hops at that time? A. 35.

Q. 35 acres in hops? A. Yes.

Q. What experience have you had in growing hops, over how many years?

A. I had experience about ten or twelve years in hops. [2*]

Q. Ten or twelve years? A. Yes.

Q. During all that time were you growing?

*** Page numbering appearing at top of page of original Reporter's Transcript.**

(Testimony of Fred Geschwill.)

A. No. I hauled my neighbor's in the hopyards, hauling hops, and working in the hop house, working in the yards.

Q. What type of work have you done in connection with the growing and harvesting of hops?

A. On my own place?

Q. On any place; what kinds of work?

A. I have been helping in the hopyards, helping haul hops in, helping pick; started out picking hops by hand; then I helped after harvest—I helped right through the whole thing, cleaning, and then I——

Q. Have you worked in the kilns?

A. Yes, helped lay the hops on the kiln.

Q. Have you helped in baling of hops?

A. Yes, I did help bale, later on, after they was dried.

Q. How many years have you actually been growing crops? A. Since about 1943.

Q. In 1947 what kind of hops did you grow?

A. Well, I raised 15 acres of early hops and 20 acres of late hops.

Q. 15 acres of fuggles and 20 acres of lates?

A. Yes.

Q. Were they seeded or seedless? [3]

A. Both were seedless hops.

Q. What does that mean in the trade, a seedless hop? What is the difference?

A. The seeded hop is the male hop in your yard.

Q. In the finished hops what is the percentage

(Testimony of Fred Geschwill.)

of seeds that a seedless hop would have as against a seeded hop? A. Oh, that varies.

Q. Approximately?

A. From six percent on above in your hop it is a seeded hop; from there on below it is semi-seedless, down to three; and then it is seedless, a seedless hop from three down to zero.

Q. If you have less than three percent, then it is a seedless hop?

A. It is a seedless hop, yes.

Q. In the production of hops what is the difference between producing seedless hops and seeded hops, as far as the quantity of hops you get out of it is concerned?

A. Seedless would not be near as heavy a yield; would not be near as heavy as the seeded hop.

Q. Do you get a higher price for seedless hops?

A. Yes, there is a difference of ten cents on the seeded hop and five cents on the semi-seedless, from three percent up to six.

Q. So, if you have less than three percent seeds, you get a ten-cent premium? [4]

A. That is right.

Q. In your yard in 1947, about what was the cost of producing hops, generally? That covers cultivation during the summer, stringing your poles, your wire, and the cost of harvesting and picking, drying and baling. About what is the cost of production per bale?

Mr. Kerr: May I suggest Counsel explain the relevancy of that line of questioning?

(Testimony of Fred Geschwill.)

Mr. Kester: I think it is background material, your Honor.

The Court: Go ahead.

A. The cost of production varied on different farms and different hop growers. You want to know mine?

Q. (By Mr. Kester): What was your own experience? A. My own setup?

Q. Yes.

A. Well, I figure my hops run around 55 cents.

Q. That is, the actual cost of production?

A. Yes.

Q. In 1947 how did you pick your hops? Were they hand-picked or machine-picked?

A. In 1947 I picked my hops with a machine.

Q. Will you explain in a general way how that operates, where the machine is and so forth?

A. The machine, that type of machine, is a stationary machine, about six or seven miles from my farm. It is located in Mt. Angel.

Q. Who owns that picking machine?

A. Mt. Angel College.

Q. Mt. Angel College? A. Yes.

Q How does that work? Tell us how that operates.

A. The hops, as they grow on the vines, are hand-strung, and the truck runs in the yard, and we chop the hopvines off about three feet above the ground and chop on top where they are tied on the wire, and lay them on the truck; then haul them

(Testimony of Fred Geschwill.)

to the machine over there, that has got some fingers or feeders that feed them into the machine.

Q. And the machine separates the hops?

A. Separates the hops from the vines and the leaves.

Q. In 1947, the 1947 season, did you have your hops contracted during the growing season?

A. I didn't have my hops contracted during the growing season, no.

Q. At the start of the 1947 season, will you describe how your hopyard appeared? I am speaking now of both fuggles and clusters.

A. During the season, starting in 1947, we had to go to a big expense in protecting our hops because we had mildew that year.

Q. You had to fight mildew that year?

A. Yes.

Q. How did the quantity of the crop look early in the season? [6]

A. I protected them as good as I could and the quantity looked good. You mean the quantity or the quality?

Q. The quantity. Did you have a heavy set or light? A. Had a good set, yes.

Q. A good set? A. Yes.

Q. At the start of the season could you tell what the prospects were for the rest of the summer? In other words——

A. Well, talking about early hops now?

(Testimony of Fred Geschwill.)

Q. Yes, the whole crop at the start of the season. Speaking in a general way, what were the prospects?

A. The prospects was for a good crop that year, but the weather was against us and we lost a lot of hops. They didn't mature, and we didn't even get them that year to bloom for us; lots of them that were lost.

Q. Can you tell us about what the blooming period was during the summer, 1947, just approximately?

A. The blooming period is up around, I would say, four weeks.

Q. About four weeks? A. Yes.

Q. Does that mean from the time they start to bloom until the hop is harvested?

A. Yes, about; I just say—I wouldn't just say exactly, but similar to that.

Q. Do you recall the picking dates in 1947 on both fuggles and [7] clusters?

A. My early hops was picked around the 10th or 11th in August, and we picked them between the two days.

Q. It took about two days?

A. Two or two and a half days.

Q. That would be about the 10th, 11th, 12th, around in there, of August?

A. Something like that, yes.

Q. On the clusters, what were the picking dates of those?

(Testimony of Fred Geschwill.)

A. The clusters, we picked on the 2nd in September, and it was around two days or two and a half days.

Q. You picked on the 2nd and 3rd and maybe the 4th? A. Maybe three days.

Q. Did you pick both the fuggles and the clusters by machine?

A. Both was picked by machine, the same machine.

Q. And then hauling the hops to the College?

A. To Mt. Angel College.

Q. During the summer, would you describe what measures you took in the cultivation of your hops and spraying and dusting or anything like that? Would you tell us what you did?

A. We started in protecting our hops when they come out of the ground, what we call ground-dusting, putting some dust on, some copper or something.

Q. What is that for?

A. Dust against mildew, so they won't get any mildew. [8]

Q. Continue. Then what would you keep on doing?

A. Keep on protecting them, sometimes about every week; we would go out and dust regardless of what the weather is except we got, well, a real good warm weather spell and we might wait a day, but this year we had to do it pretty heavy, that is, in 1947.

(Testimony of Fred Geschwill.)

Q. What brings on mildew?

A. It would be pretty hard for me to explain that, but mildew is when it is hot weather, we will say, like—well, there isn't much of a breeze going through the air and——

Q. Does moisture help to produce mildew? Is that it?

A. Moisture and heat together will, I suppose.

Q. Moisture and heat; so the weather has quite a bit to do with the development of mildew, does it?

A. That is right.

Q. How was it in 1947, the 1947 season, generally speaking, for mildew? A. It was bad.

Q. Was mildew rather widespread?

A. It was spread pretty well all over the state.

Q. Spread pretty well all over the state?

A. Yes, and, as a matter of fact, some in Washington.

Q. During the course of the year did you have occasion to see other hopyards around the valley?

A. Yes, I did see other yards. [9]

Q. How would you describe your yard as compared with other yards? How would you describe your yard as compared with other yards that you saw, with respect to the amount of mildew?

A. Well, I was quite proud of my yard all the season through because I worked it and protected it good. When I seen other yards, I went back to my own and looked at my own and I figured I had a good yard for that year.

(Testimony of Fred Geschwill,)

Q. Did they have more or less mildew at other yards, generally?

Mr. Kerr: I object to this line of questioning, your Honor, and object to Counsel's examination of the witness as to mildew in yards other than his own, prior to the date of the contract, on the ground and for the reason that the same is irrelevant.

The Court: He may answer, subject to the objection.

Q. (By Mr. Kester): Would you describe whether your yard had more or less mildew in it than other yards you saw, generally?

A. My yard did not have as much as the other yards in general.

Q. How would you describe the mildew in your yard? Was it heavy or light or medium?

A. I figured it was light, had a slight touch.

Q. A slight touch? A. Yes.

Q. Was there any mildew affecting the fuggles in your yard?

A. Yes, we had a patch of mildew in the fuggles that same year, I suppose. It is a more thrifty hop than the late hop, but we had a touch. [10]

Q. The fuggles aren't so susceptible as the late hops? A. That is right.

Q. Would you tell us what other things a hop rancher is concerned with in raising hops besides mildew? What other things affect the hop?

A. Well, the biggest worry a hop grower has

(Testimony of Fred Geschwill.)

besides mildew is lice on these hops after they mature.

Q. If there are lice on the hops what does that do?

A. The lice, they multiply so bad that if a grower don't get in on time and use Blackleaf "40" ingredient and kill them on time—by dusting you could get a 100 percent kill, if you get after it, particularly at night. If you don't kill these lice, they will live so long and then they die on the petals and new ones come on and they multiply so fast and it gets so bad on the hops they will get black; the hops finally get black.

Q. What do they call that condition?

A. They call it molding.

Q. Moldy? A. Moldy.

Q. If there is mold in hops, they would appear as black?

A. That appears like a black hop, yes, usually die right on the vine because the stuff gets so thick they choke the hop.

Q. How was your yard from the standpoint of lice?

A. I didn't have no lice in the whole yard. I protected it. If you do it right, possibly you get 100 percent; you can get a [11] 100 percent kill if you kill——

Q. Did you spray?

A. No, we dusted for it in the two yards. You

(Testimony of Fred Geschwill.)

go out and you spray that dust on. I did dusting at night.

Q. You did not have any lice at all?

A. No, but I dusted in order to play safe.

Q. What effect does mildew have on hops? How does mildew appear on the hop?

A. Mildew appears on the hop sometimes early in the growing stage, as soon as the hop comes out of the ground in the spring of the year, in April, and if the weather is not right the vine just wilts away, just won't grow, and you ain't got no production at all.

Q. If mildew hits the vines when they are young, it may prevent the vines from growing?

A. That is right.

Q. How about after the vine is grown up and the hops are set; if mildew hits then, what will that do?

A. After the hops grow and the vine gets bigger by itself, and you cultivate well and keep the moisture good, your hop will stand—your hopvine will stand a lot more tougher weather.

Q. What effect does it have on the hops themselves?

A. On the hops itself, it would not—if the mildew is bad, it won't produce a hop at all. I am a little stuck. I can't explain that good. [12]

Q. I think Counsel would agree to this: If mildew strikes before the hop is set; it will prevent the hop from developing, is that correct?

(Testimony of Fred Geschwill.)

A. That is right, yes.

Q. Suppose the mildew hits after the hop is pretty well developed, then how does it appear?

A. After the hop is pretty well developed, it will show—your hops will get kind of a reddish color. It affects the petals pretty well.

Q. Appears as a color on the petal?

A. Color of the hops.

Q. Yes, sort of an orange color on the petals?

A. That is right.

Q. Does a hop get that reddish-orange color from any other cause?

A. It could get it by wind whip.

Q. Anything else? Does the hot sun have anything to do with it?

A. Not too much; more apt to be wind whip than the sun.

Q. What color is the hop when it is not quite ripe? What color is it?

A. There is a different color—the Oregon hop is a green color; just depends on the moisture or cultivation; it gets kind of golden-like.

Q. Sort of a golden color?

A. A golden yellow, yes. [13]

Q. Does that change as the hop gets riper?

A. No, I wouldn't say so.

Q. It stays about the same? A. Yes.

Q. In your yard did you irrigate or water?

A. I did irrigate my early hops, yes.

Q. You watered the early ones?

(Testimony of Fred Geschwill.)

A. Yes, watered the early ones.

Q. Did you water the lates?

A. No, didn't water the lates. I couldn't bring water up that high.

Q. Is the color and appearance of a hop affected by the kind of soil or the type of ground, as to whether it is on a hill or in a valley?

A. Yes; to some extent it is, yes.

Q. What is the relationship there, generally speaking?

A. A rich piece of ground, where there is a lot of moisture in it, it has more of a red color. It has a lot to do with the water.

Q. In the hop itself, what is the substance that makes the hop useful for brewing beer?

Mr. Kerr: Objection, your Honor. There is no showing that this witness knows that any hop is used for making beer. It is a highly technical subject and he has not qualified as an expert. If your Honor allows him to go ahead, irrespective of the objection, [14] may it be understood that we object to this line of questioning without the necessity of repeating the objection?

The Court: It is so understood, yes.

Q. (By Mr. Kester): Do you have the question in mind? What substance or quality in a hop is useful for the brewing of beer?

A. They use what they call the lupulin.

Q. Lupulin? A. Yes.

(Testimony of Fred Geschwill.)

Q. How does that appear in the hop? What does it look like? A. It looks like golden yellow.

Q. Golden yellow, sort of dust-looking?

A. It is dust, yes.

Q. Is that the pollen of the hop?

A. That is the pollen of the hop. That is really what we want.

Q. That substance is quite close to the core of the hop?

A. That is right, right close to the core.

Q. The petals of the hop are around the outside?

A. Yes, that is protection for that lupulin.

Q. If mildew were to touch the outside petals and turn them reddish or orange-colored, would that normally affect the lupulin on the inside of the hop?

A. Not if it is in the later season. I imagine if it is in the real early stage it wouldn't make no hop, but later on it don't affect it at all.

Q. Getting down to the 1947 season—we have been talking [15] about hops in general, Mr. Geschwill. A. Yes.

Mr. Kester: I take it it is agreed in 1947 Mr. Geschwill had contracts with Loewi for these cluster hops, his cluster crops?

Mr. Kerr: We so stipulate. Will it be stipulated that the document which you have in your hand is one of the executed originals of the contract?

(Testimony of Fred Geschwill.)

Q. (By Mr. Kester): Would you examine this contract, Mr. Geschwill, and state if that is the contract you had with Hugo V. Loewi, Inc.?

A. Yes.

Q. You can hand it to the Bailiff.

A. Yes.

Mr. Kester: I take it this will be offered in evidence. As a matter of fact, there are a number of exhibits which were identified at the time of the depositions. I take it there will be no questions raised as to their identification, and maybe we can save time by offering the exhibits all in evidence and they can be marked sometime during the recess of the Court, if that is satisfactory.

Mr. Kerr: I suggest that they be offered individually.

The Court: I will determine that. That is what the pretrial is for, to get the exhibit question out of the way.

All exhibits that you have agreed on as to identity may be admitted in evidence—may be offered in evidence by the party who had them identified, and they will be received subject to such objections as have heretofore been stated on the record or may be hereafter stated on the record by opposing counsel.

Mr. Kester: Thank you, your Honor.

The Court: We will proceed on that basis.

(Testimony of Fred Geschwill.)

Plaintiff's Exhibits

(The following Plaintiff's Exhibits were thereupon received in evidence):

Exhibit No. 1—Agreement dated August 18, 1947, between Fred Geschwill and Hugo V. Loewi, Inc.

Exhibit No. 2—Receipt dated August 27, 1947, in amount $4,000, advance under contract.

Exhibit No. 3—Letter dated October 30, 1947, C. W. Paulus to Fred Geschwill.

Exhibit No. 4—Letter dated October 3, 1947, C. W. Paulus to Fred Geschwill.

Exhibit No. 5—Hop Inspection Certificate, September 15, 1947, signed A. J. Fleming.

Exhibit Nos. 6(a) and 6(b)—Weight slips, dated October 10, 1947, covering 130-bale lot.

Exhibit No. 7—Carbon copy of letter dated September 17, 1947, Fred [17] Geschwill to Hugo V. Loewi, Inc.

Exhibit No. 8—Letter dated August 27, 1947, C. W. Paulus, by James A. Byers to Fred Geschwill.

Exhibit No. 9—Letter dated September 17, 1947, C. W. Paulus by James A. Byers to Fred Geschwill.

Exhibit No. 10(a)—Hop Purchase Invoice, dated September 25, 1947, covering 78 bales of fuggles.

Exhibit No. 10(b)—Weight slip, dated September 24, 1947, covering 78-bale lot.

(Testimony of Fred Geschwill.)

Exhibit No. 10(c)—Hop Inspection Certificate dated September 3, 1947, signed A. J. Fleming.

Exhibit No. 11—Carbon copy of Hop Sample Advice, dated September 16, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Exhibit No. 12—Carbon copy of Hop Sample Advice, dated September 16, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Exhibit No. 13—Carbon copy of Hop Sample Advice, dated September 23, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Exhibit No. 14—Carbon copy of Hop Sample Advice, dated October 11, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Exhibit No. 15—Carbon copy of Hop Sample Advice, dated September 25, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Exhibit No. 16—Carbon copy of Hop Sample Advice, dated August 26, 1947, C. W. Paulus to Hugo V. Loewi, Inc. [18]

Exhibit No. 17—Letter dated September 30, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Exhibit No. 18—Telegram dated September 17, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Exhibit No. 19—Letter dated September 18, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

(Testimony of Fred Geschwill.)

Exhibit No. 20—Telegram dated September 18, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Exhibit No. 21—Photostatic copy of letter dated September 22, 1947, Hugo V. Loewi, Inc., to C. W. Paulus, (3 pages).

Exhibit No. 22—Telegram dated September 30, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Exhibit No. 23—Letter dated October 21, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Exhibit No. 24—Telegram dated November 15, 1947, C. W. Paulus to Hugo V. Loewi, Inc.

Exhibit No. 25—Telegram dated December 2, 1947, Hugo V. Loewi, Inc., to C. W. Paulus.

Exhibit No. 26—Telegram dated October 21, 1947, Hugo V. Loewi, Inc., to C. W. Paulus. [19]

Q. (By Mr. Kester): With whom did you deal in matters leading up to the execution of this contract (Defendant's Exhibit No. 1)?

Mr. Kerr: If your Honor please, I do not want to interrupt unnecessarily, but again we want the record to show that we object to this line of questioning on the ground that the negotiations leading up to the execution of the contract were merged in the contract itself and that the contract speaks for itself and, therefore, we object to this line of questioning.

The Court: He may answer, subject to the objection.

(Testimony of Fred Geschwill.)

Q. (By Mr. Kester): First of all, I will ask you who is the Oregon representative of Hugo V. Loewi, Inc., the defendant in this case?

A. Mr. Paulus.

Q. Mr. C. W. Paulus? A. Yes.

Q. Your dealings in this case were with Mr. Paulus himself or his associates?

A. He had some assistant there, his field man, he called him.

Q. Who were the field men of Mr. Paulus?

A. The first one I met was Lamont Fry.

Q. What other ones did you deal with at all?

A. Later on?

Q. Who were the other field men of Mr. Paulus?

A. I believe his name is Byers.

Q. Byers? [20]

A. Byers, yes.

Q. When did you first discuss with Mr. Paulus or his representative the matter of your 1947 crop of hops? When was the first conversation?

A. The first conversation I had with Mr. Paulus was when I was picking my early hops. That is the first time I saw Mr. Paulus.

Q. Did you meet him there by the picking machine?

A. Met him by the picking machine, yes.

Q. I think you said it was about the middle of August or about the 10th or 11th or 12th?

A. About the 10th, 11th or 12th, or 14th; could not remember the exact date or day.

(Testimony of Fred Geschwill.)

Q. Who was with Mr. Paulus at that time?

A. Mr. Oppenheim was with him.

Q. Who is Mr. Oppenheim?

A. I never got acquainted with Mr. Oppenheim, but they told me afterwards that Mr. Oppenheim would like to buy these hops some way or another.

Mr. Kester: May it be stipulated that Mr. Oppenheim is the principal officer and owner of the corporation, Hugo V. Loewi, Inc?

Mr. Kerr: We so stipulate.

Mr. Kester: And this is Mr. Oppenheim here in court?

Mr. Kerr: It is.

Q. (By Mr. Kester): You say Mr. Paulus and Mr. Oppenheim were at the picking machine at Mt. Angel? [21] A. Yes.

Q. What conversation did you have with them or with either of them at that time?

A. Mr. Paulus found out that my hops wasn't contracted and he come to me and said, "I understand your hops are open," and "We would like to buy them."

Q. At that time were the hops coming through the machine? A. Yes.

Q. Were they looking at the hops as they came through the machine?

A. When I talked to Mr. Paulus, I don't think he was. I wouldn't recall it, but no doubt he had. I am sure he had looked at the hops.

(Testimony of Fred Geschwill.)

Q. Was it possible for them to see them as they came off the machine?

A. They couldn't help it. They was right there at the machine.

Q. What did you say when he suggested he would like to buy hops?

A. I told him I wasn't ready for that yet; I would like to pick my hops and see what I could get. I just can't remember what I said, but something like that. Just didn't make no deal with him.

Q. You did not make any deal with him at that time? A. No.

Q. When was the next time you had any conversation with anyone [22] representing Loewi?

A. I had to go up on the 17th of August, up to the College, and find out how they were getting along with the hops.

Q. You went up to Mt. Angel College on the 17th?

A. The 17th of August. As I come down, I met Mr. Fry.

Q. Mr. Fry? A. Yes.

Q. Was he there at the College?

A. No, he was uptown.

Q. In Mt. Angel?

A. In Mt. Angel. I believe he was in the warehouse.

Q. What warehouse is that?

A. Schwab's warehouse.

(Testimony of Fred Geschwill.)

Q. What conversation did you have with Mr. Fry at that time?

A. Mr. Fry come to me and said, "Fred, I got a good deal here," and I said, "That is what I am looking for," and he told me he had a contract here at 80 cents floor and "you could pick your market, whenever it suits you best."

Q. That was an 80-cent floor?

A. An 80-cent floor.

Q. You mean a minimum of 80 cents?

A. Well, that would be 80 cents, and they go up regardless, from that on up to the first of October I could pick my market, if it goes up or down—couldn't go any lower than 80. That was understood. They guaranteed you that much. [23]

Q. You could pick the grower's market price?

A. That is right.

Q. Any date between then and the first of October? A. Yes.

Q. Was that the customary type of arrangement in the hop business, the customary type or arrangement to make?

A. That was the first time that deal come out, that year.

Q. The first time they started making that kind of a deal, that kind of contract, in 1947?

A. That is right.

Q. Has that kind of a contract been customary in the hop business, where the buyer will permit

(Testimony of Fred Geschwill.)

the grower to select the grower's market price between certain periods?

A. It has been, I believe, in six years; when there was a shortage of hops, or a scarcity, they protect the grower pretty well at that price.

Q. The buyer guarantees the minimum price in any event? A. That is right.

Q. You say he offered you an 80-cent floor?

A. Offered me an 80-cent floor, yes.

Q. What did you tell him?

A. I told him the only men I had been dealing with was Williams & Hart, Harry Hart.

Q. Are they hop brokers?

A. They are hop brokers and also growers. [24]

Q. Had you previously dealt with them?

A. I previously—That is the only men I have dealt with in hops. They come out to my yard during the growing season when the hops was raised—

Q. You mean Hart had? A. Yes.

Mr. Kerr: I wonder how far afield counsel is going to be permitted to go.

The Court: You say you wonder?

Mr. Kerr: Yes, your Honor. I object to this line of questioning on the ground it is incompetent, irrelevant and immaterial, referring to relations with an entirely different buyer not involved in this case.

The Court: He may answer, subject to the objection.

Q. (By Mr. Kester): I would like you to tell us

(Testimony of Fred Geschwill.)

your conversation with Mr. Fry. You started to tell about a deal you had with Hart. What was the conversation you had with Fry?

A. I told Mr. Fry, I said, "That deal suits me fine; it is a good enough deal, but I talked to Mr. Harry Hart—" I said I had to talk to Mr. Harry Hart before I deal with somebody else, and give him a chance on these hops.

Q. In other words, you told Hart he could have first choice?

A. Yes. So, it went on—It was around 4 o'clock, and we couldn't get Mr. Hart on the phone until 7 o'clock. Finally we got him, and I told him my deal with Mr. Lamont Fry. [25]

Q. Pardon me. Did Fry say anything to you just before you called Hart? Did he say anything more about what he would be willing to do?

A. Well, after he found out that he couldn't make a deal with me before I talked to Mr. Hart, as soon as I had Mr. Hart on the phone, he made the remark—He said, "Fred, before you make a deal, I have got something better up my sleeve," and then I went on the phone and talked to Mr. Hart and I told him about that offer here and he said, "Gosh, Fred, I would like to have your hops."

I said, "Well, you know, if he gives me more money, that is really what we are after," and he said,—I believe he offered me eighty-one and a quarter cents then—talked like he would take it out of his commission.

(Testimony of Fred Geschwill.)

Q. What did Fry say to that?

A. Well, then, I went away from the phone and I told Lamont Fry, I said, "All right, if you want these hops, you can have them for 85 cents floor." He went on the phone and talked to—I believe he got Mr. Paulus on the phone, and then he said he would accept these hops.

Q. At 85? A. At 85 floor, yes.

Q. Where did this conversation take place?

A. Took place about 8:00 or 9:00 o'clock in the evening in Schwab's warehouse. [26]

Q. After the conversation, what did you do?

A. I went to my pickup and went home.

Q. Did you, yourself, talk to Mr. Paulus on the phone?

A. I don't know if I did. I might, but I wouldn't remember it since last August. Fry done most of the talking there. I don't remember if we did—I did talk later on to him on the phone; may have been the same day. I don't know.

Q. Then what happened after that?

A. I was hardly home and here comes Lamont Fry, and he said, "In order to tie that deal up, you have to sign your name here," and he handed me a slip, and they agreed to take my hops at 85 cents floor, and eight per cent leaf and stem; if I picked them cleaner than eight per cent, then I got a credit of one cent a pound.

Q. In other words, for eight per cent leaves and stems, you would get one cent a pound—You would

(Testimony of Fred Geschwill.)

average one cent a pound for cleaner picked hops?

A. Yes, that is right; if it goes above eight per cent, I get penalized one cent.

Q. They would take one cent per pound off it if it is more than eight per cent?

A. More than eight per cent, yes.

Q. Was anything said at that time about a premium for seedless?

A. Yes, he mentioned it, also.

Q. What was the arrangement made? [27]

A. I was understood, and he agreed, there will be a ten-cent premium for seedless, but at that time I didn't know if I had any seedless because the government inspects these hops and analyzes them to see if they are seedless hops. The estimates run pretty close.

Q. That is determined by a percentage of seed?

A. A percentage of seed in the hops.

Q. Was anything said at that time about whether they would take fuggles or lates or both?

A. Well, it was understood they had to take both hops because I couldn't deal with one party on my late hops and with the early hops somewhere else. It didn't look right.

Q. You say he had some sort of a paper for you to sign? A. Yes.

Q. Was that this contract (Defendant's Exhibit No. 1) or something else?

A. No, it was a little narrow piece of paper with some printing. I had him write that down, our un-

(Testimony of Fred Geschwill.)

derstanding that we had, that it covered the combined deal, the early hops and the late hops.

Mr. Kester: I understand, counsel, that that preliminary sales slip is not in existence?

Mr. Kerr: That is correct.

Q. (By Mr. Kester): At the time that this conversation occurred on August 17th, had your fuggle crop been entirely picked? A. Oh, yes. [28]

Q. They were all picked?

A. Yes. It was picked around the twelfth, thirteenth or fourteenth.

Q. And your first crop, you say, was picked on the second of September, is that right? A. Yes.

Q. So, it would be only a little over a week before the picking of the clusters when this happened?

A. That is right.

Q. At that time was there any mildew in your cluster crop?

A. At that time, yes, I had slight mildew.

Q. Whatever mildew there was, was that visible upon looking at the hops on the vine?

A. Oh, yes.

Q. In this arrangement or under this arrangement, was there any difference between the price for fuggles and the price for clusters?

A. No, it was the same, the same arrangement made: there was one 85-cent floor.

Q. 85-cent floor for both, and you were to pick the market price?

(Testimony of Fred Geschwill.)

A. An 85-cent floor for both and I was to pick the market price.

Q. This was on the seventeenth. What was the next thing that happened?

A. On the eighteenth I was working around the barnyard and Mr. Byers came along about 10:00 or 11:00 o'clock.

Q. Mr. Byers? [29] A. Yes.

Q. He is the man you mentioned as representing Loewi?

A. That is right. He handed me that contract here.

Q. That is Defendant's Exhibit No. 1 that has been referred to here, this printed form?

A. Yes.

Q. What conversation was there between you and him at that time?

A. Not much; nothing at all, only he said I should sign the contract and he would deposit three thousand something—$3200—to tie the deal.

Q. That $3200 would be a picking advance on the fuggles? A. Yes.

Q. Did you sign the contract at that time?

A. I did sign the contract and, as I looked at it, it was not signed by Mr. Oppenheim at all, and I told him, "Have Mr. Oppenheim sign it."

Q. Did a contract subsequently come to you that was signed by Mr. Oppenheim? A. Yes.

Q. I will show you Plaintiff's Exhibit No. 8, which is the letter of August 27, 1947, and ask you

(Testimony of Fred Geschwill.)

if that is the letter with which Mr. Paulus sent you the signed copy of the contract?

A. I believe it is.

Q. At the same time did he send you with that letter of August 27, 1947, the $4,000 advance on the clusters? [29]

A. Yes. It says here in the letter of the 27th of August they was advancing $4,000 on the late hops, on the cluster hops.

Q. Did Mr. Fry or anyone representing Loewi ever go out and look at your hops in the field while you were present? A. He never did.

Q. Did Mr. Fry ever tell you whether or not he had looked at your hops in the field?

A. Never did, but he happened to be in my place one time when I was up at the hop-picking machine again, and he told me he was looking for me.

Q. Did he say anything about the hops at that time?

A. He must have went out in my storeroom and looked at these hops because he mentioned that. He said, "You sure did a good job."

Q. What was he referring to?

A. To these late hops.

Q. To the late hops? A. Yes.

Q. Was that with reference to the character of drying, or what?

A. I didn't ask too much, because I figured it was understood all around, naturally.

Q. The hops that were machine-picked at the

(Testimony of Fred Geschwill.)

Mt. Angel College, what about the drying and baling of those? When was that done?

A. The drying and baling part of it was done in Mt. Angel College because we didn't have enough capacity to take them as fast as [31] they picked these hops. I couldn't dry them all in my hop house.

Q. Did you dry part of them there?

A. I dried part of them.

Q. And the balance was dried at the College?

A. The balance was dried up there.

Q. Explain briefly to the Court the process of drying hops. How is it done?

A. After the hops are picked, they put them in sacks, about 50 pounds in a sack, and they carry them in the kiln—if they got enough hops picked—and then they lay them in the kiln, about two and a half feet deep, and then, after that is all done, they start a fire in under them, start a fire in the stove, and we have a fan above to suck that heat through these hops in order to get them dry. It takes about fourteen or sixteen hours to dry these hops. After these hops are dry, the fire is taken out of the stove and cool air from the fan sucks through the hops again to cool them off. Then they are taken off that kiln and put in the storeroom, and there they lay about two or three days—it depends on how large a storeroom you have got. From then on they go in the bale. They are baled up with burlap.

Q. Do you know, approximately, when the hops were delivered to the warehouse?

(Testimony of Fred Geschwill.)

A. These hops—the early hops or the late hops?

Q. Well, both. When were the fuggles delivered?

A. Within two days, I suppose. I had to get those hops out [32] of there because they kept on picking hops right along, and then they were hauled to the warehouse for storage and receiving by the company.

Q. Was there any arrangement between you and representatives of Loewi as to where the hops were to be delivered?

A. I don't know if it says in the contract or not, but it is customary—we always haul and store them in Schwab's warehouse, around that vicinity.

Q. Is that the only bonded warehouse in Mt. Angel?

A. The only bonded warehouse in Mt. Angel.

Q. Was there any objection ever raised to the place where you delivered hops? A. No.

Mr. Kester: Will Counsel stipulate that on September 16th representatives of Hugo V. Loewi withdrew samples from the cluster crop of Mr. Geschwill, consisting of 130 bales; drew two samples, and sent one sample by air express and one sample by ordinary express to Hugo V. Loewi at New York on September 16th—one sample by air express and the other by ordinary express?

Mr. Kerr: We so stipulate.

Mr. Kester: For the record, we refer to Plaintiff's Exhibits No. 11 and No. 12, which are Hop Sample Advices, showing those samples being sent.

(Testimony of Fred Geschwill.)

Q. Were you present, Mr. Geschwill, at the time Hugo V. Loewi's [33] representative took samples from the hops, referring now to the clusters?

A. No, I don't think—I never was present.

Mr. Kester: May it also be stipulated that, according to the Department of Agriculture inspection, the 130 bales of cluster hops of Mr. Geschwill analyzed one per cent seeds and eight per cent leaves and stems, referring to Exhibit No. 5, which is the inspection certificate?

Mr. Kerr: We will so stipulate.

Q. (By Mr. Kester): When did you select the grower's market price under the contract? Do you recall the transaction between yourself and the representative of Paulus at that time?

A. I wouldn't recall the exact date, but I called Mr. Paulus on the phone one time, one evening.

Q. You called Mr. Paulus on the phone?

A. Yes.

Q. Was that after the clusters had been delivered to the warehouse?

A. Oh, yes, all the hops was delivered in the warehouse. They was all there.

Q. You called Mr. Paulus on the phone. What was the conversation?

A. I asked him what the grower's market is today and——

Q. What did he say?

A. He said 85 cents, seeded hop. I said I be-

(Testimony of Fred Geschwill.)

lieved it was 90 [34] and then he said, "Yes, there is a 90-cent floor—a 90-cent market on the fuggles."

Q. A 90-cent market on the fuggles?

A. Yes.

Q. And 85 on the clusters?

A. On the late cluster hops.

Q. Did you at that time tell him whether or not you wanted to select that price?

A. I told him then that I select that market; I am satisfied with that price and I didn't care how much higher they would go; that was good enough.

Q. What did he say to that?

A. He said that would be fine, and he is going to have that in writing so he will send me some kind of a statement out, and we would sign it and agree on the price, so I told him——

Q. Did he send such a letter for you to sign?

A. I am sure I did get one.

Q. I will ask the Bailiff to hand you Plaintiff's Exhibit No. 9, which is a letter dated September 17, 1947, from Mr. Paulus by James A. Byers to you, Mr. Geschwill. A. Yes.

Q. I believe that this typewritten sheet became detached from Exhibit No. 9, is that not correct?

Mr. Kerr: That is correct.

Q. (By Mr. Kester): Is that the letter (Plaintiff's Exhibit No. 9) [35] with which he sent you the form for you to select that price?

A. Yes, it says here——

(Testimony of Fred Geschwill.)

Q. I will ask the Bailiff to hand you Exhibit No. 7 and ask you if that is the signed copy which you returned to Mr. Paulus? A. Yes, it is.

Q. Those letters and the price selected only refer to the cluster crop, is that correct? That is, 85 cents? A. Yes.

Q. Was there a similar letter selecting a 90-cent price for the fuggles?

Mr. Kerr: Objection, your Honor. Let us have the record show our objection previously made applies to this question, concerning any contract not the subject of this action, and specifically a contract covering the purchase or sale of fuggle hops, as being wholly irrelevant. This case relates to cluster hops, your Honor, the contract for the sale and purchase of cluster hops. These questions relate to an entirely separate contract, relating to fuggles, fuggle hops, and they have no bearing upon the issues in this case.

Mr. Kester: I might say to the Court in that connection, in order to keep our position clear, that it is our understanding that they contracted for both fuggles and clusters at the same time, using forms that were substantially identical except for the price ultimately to be paid. I think both contracts should be construed together, in order to understand the position [36] the parties were in at the time they entered into this deal. The fuggle arrangement is certainly competent as showing what the transaction was and also how the parties construed the

(Testimony of Fred Geschwill.)

arrangement because what was done in connection with the fuggles contract is of importance in construing what was done or should have been done in connection with the clusters contract.

Mr. Kerr: I don't recall any evidence that this is a one-package deal or that the cluster contract was tied up with any other contract. The contract which now is in evidence makes no reference to any such other contract and obviously refers only to the cluster hops.

The Court: Proceed, Mr. Kester, subject to the objection.

Mr. Kester: May it be stipulated, Counsel, that the contract which was entered into with respect to the fuggles was substantially identical?

The Court: He does not want to do that. Go ahead and prove your case.

Mr. Kester: May I ask Counsel to produce the fuggles contract so we may offer it in evidence?

Mr. Kerr: If the Court rules that is relevant, we will produce it.

The Court: Subject to the objection, produce it, please.

Mr. Kester: Referring to Plaintiff's Exhibit No. 18, I will ask Counsel to stipulate that on September 17, 1947, Mr. Paulus wired Hugo V. Loewi, Inc., to the effect that Sample 79, which [37] referred to the Geschwill samples previously sent on September 16th, analyzed eight percent leaves and stems and one percent seed.

(Testimony of Fred Geschwill.)

Mr. Kerr: We will stipulate that such a wire was sent, referring to Sample 79, applying to cluster hops only.

Mr. Kester: And that Plaintiff's Exhibit No. 18 is a carbon copy of that telegram?

Mr. Kerr: That is correct.

Mr. Kester: Will Counsel stipulate that on the day following, on September 18th, Hugo V. Loewi, Inc., wired to Paulus, referring to Exhibit No. 20, referring to Sample 79, the Geschwill crop, "These hops fair quality but not prime delivery. At what price can you settle with grower?" Exhibit 20 is the original telegram delivered to Paulus.

Mr. Kerr: We will so stipulate.

Mr. Kester: Will Counsel stipulate that on September 18th Hugo V. Loewi, Inc., wrote to Paulus, the original letter being Exhibit No. 19: "Confirming wire——"

The Court: Just put the letter in evidence. It speaks for itself.

Mr. Kester: Will Counsel stipulate that this letter was sent on the 18th?

Mr. Kerr: We will so stipulate.

Mr. Kester: Thank you.

Q. Mr. Geschwill, were you present at the time that the fuggles [38] were weighed into the warehouse? A. Yes.

Q. Could you state approximately the date that was?

A. I believe it was along about the 24th of September. I wouldn't know——

(Testimony of Fred Geschwill.)

Mr. Kerr: Our previous objection applies to all the questions relating to the fuggles or any transaction concerning the fuggles.

The Court: It is so understood.

Mr. Kester: Some of these exhibits have become separated.

The Court: I don't think we ought to spend much time on the exhibits. They are all in. I will read them or you can call my attention to them later.

Mr. Kester: I want to use this particularly to refresh the witness' recollection.

Q. I will ask the Bailiff to show you Exhibit No. 10 and Exhibit 10-B, the weighing-in slip on the fuggles. I will ask you if you were present on the 24th, at the time that was done? A. Yes.

Q. At that time was Mr. Fry present?

A. Mr. Fry was present when they took in those hops.

Q. Was he the one who acted for Hugo V. Loewi, Inc., in taking in the fuggles?

A. That is right.

Q. Did you talk with him at that time about taking in the clusters? [39]

A. Yes. I made the remark to Lamont, "I wish that you would keep right on going. We will weigh them all up and be done with it," because, after all, I closed my deal with him and accepted the bonus price a week ago or so, and he said, "Well, I will have to talk to Mr. Paulus."

(Testimony of Fred Geschwill.)

Q. Were your clusters put in the same warehouse?

A. The same warehouse at that same time, yes. I called up Mr. Paulus that night, after they got done with the early hops, and he said he had no orders yet.

Q. He said he had no order yet to take in the clusters? A. Yes.

Q. Were you paid for your fuggles on the next day, on the 25th? A. Yes.

Mr. Kester: I assume we can stipulate that payment of $15,741, on the fuggles, less advances of $3200, was made to Mr. Geschwill, refering to Plaintiff's Exhibit No. 10-A and No. 10-C.

Mr. Kerr: We will stipulate the transaction is covered by Exhibit No. 10-A.

Mr. Kester: And referring to Exhibit No. 10-C, which is the inspection certificate on the fuggles, it shows two percent seeds and eight percent leaves and stems. Is that right?

Mr. Kerr: That is correct.

Q. (By Mr. Kester): How would your fuggle crop compare with the cluster crop, as far as quality is concerned? [40]

A. As far as quality was concerned, I think my hops, my late hops, cluster hops, was just as good for quality.

Q. Were they picked, dried and baled in the same condition—under the same conditions?

A. Under the same conditions.

(Testimony of Fred Geschwill.)

Q. And by the same people?

A. By the same people. The only thing is my early hops looked a little more greener, because they was an Oregon hop.

Q. Did you have any conversation or dealings with Mr. Paulus after the fuggles were weighed in and before the clusters were weighed in, with respect to when they would pay for the clusters?

A. I can't recall exactly—that day when I asked him to take them in—on the 24th—and then later on, I believe, he sent me a notice by mail that they would take them in around the 12th—around the 10th, 12th or 15th, in October; or, that might have been by phone. I wouldn't know, anyhow.

Q. Did you receive a letter from Mr. Paulus—I am trying to find it here—dated October 3rd, with respect to the cluster crop?

A. I believe I did.

Q. Do you recall the substance of that letter?

A. I wouldn't know exact what the meaning was, but I believe it was stated on that day they were going——

Q. I will have the Bailiff hand you Defendant's Exhibit No. 4, which is a letter dated October 3, 1947, and I will ask you if [41] that is the letter received by you from Mr. Paulus with respect to inspecting or weighing in your cluster crop?

A. Yes, it is.

Q. Did Hugo V. Loewi, Inc., representatives

(Testimony of Fred Geschwill.)

weigh in and inspect your 1947 clusters in the warehouse? A. Yes.

Q. I will ask the Bailiff to show you Plaintiff's Exhibits 6-A and 6-B, which are weight slips, and call your attention to the date of October 10th, and I will ask you if you were present at the time the clusters were weighed in on the 10th of October?

A. Yes.

Q. Who was there at that time representing Loewi on the weighing in of the clusters?

A. Lamont Fry.

Q. Would you describe for us what the process of weighing in hops is? What is done at that time?

The Court: Why do you need to go into that?

Mr. Kester: I think, your Honor, it will have some bearing because it shows what samples were taken, what inspection was made of the hops, and that bears on the quality of the hops.

The Court: All right.

A. They go through each bale, and they have a knife about a foot or so long, and they run it in there, and take a sample out of each bale and see if they are properly dried; then every ten bales they take a sample which represents the whole lot. [42] If there is a hundred bales there, that would be ten samples.

Q. (By Mr. Kester): About how large are those samples taken from every bale?

A. I would say they would be about five or six inches wide and four inches high.

(Testimony of Fred Geschwill.)

Q. The tryings that are taken, the samples taken from every bale,——

A. Oh, those samples, just enough for a handful, and he looks at them, at those samples and, if they seem right, then he goes on; but if they are not dried right, he sets that bale aside.

Q. The tenth-bale samples you speak of, how large samples are they?

A. I would say that they are about four inches wide and five inches or six inches long; it is square.

Q. Are they cut out from the bale with a special tool for that purpose?

A. A special tool; they go right in the bale and cut it out, and they take a sample of each ten bales, like 10, 20, and so on.

Q. At the time Mr. Fry was weighing in the clusters, did you have any conversation with him with respect to those hops?

A. He went through the whole lot. Naturally, he wanted to know if they was dried right, and I said they was all right. After taking all the samples, he remarked—he said, "That is one of the nicest hops I seen this year."

Q. Was anyone else present at the time that statement was made? [43]

A. Yes, there was Schwab and Mr. Jim Fournier. He happened to go through that warehouse then.

Q. How did those samples look at that time?

A. The samples all had a touch of mildew in

(Testimony of Fred Geschwill.)

them. They were affected by slight mildew but, otherwise, they looked good. They looked much better than previous years when they had lice.

Q. Had prior crops, in other years, been sold without any difficulty?

A. All without any difficulty. Sometimes they looked a good deal better.

Q. At that time, when they were weighed in and the samples taken, did Mr. Fry, or anyone representing Loewi, say anything as to whether or not the hops were accepted at that time or rejected, either one?

A. Well, I figured they was accepted when they weighed them, and he talked so much about it——

Q. What is the custom in the hop business generally as to when hops are deemed accepted?

Mr. Kerr: I will object to that, if your Honor please. The contract speaks for itself as to when these hops shall be deemed accepted.

The Court: What does the contract say about it?

Mr. Kester: I do not believe the language is specific there, if the Court please. It is a matter that is governed by custom and usage in the trade, and the contract was made in the light [44] of custom and usage in the trade.

The Court: What do you claim that the contract says?

Mr. Hill: May I read it?

The Court: Yes.

(Testimony of Fred Geschwill.)

Mr. Hill: "The buyer does hereby purchase the above-described quantity of hops and agrees to pay therefor by check, draft, or in lawful money of the United States of America, on the delivery thereof and acceptance by the buyer, and within the time and conditions herein provided, the price or prices as aforestated for each pound thereof which shall be delivered to and accepted by the buyer, who is to have the right to inspect the same before acceptance, and to accept any part less than the whole of the hops so bargained for, should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and tendered for acceptance be less than the amount herein bargained and sold," and so forth.

So, your Honor, that contract means the hops are sent to the warehouse; the buyer has a right to inspect them; if he decides not to accept any or all of the hops, he is privileged so to do, if they do not measure up to contract specifications.

I submit for that reason what the custom may have been elsewhere, under other conditions and other circumstances and between other people, has nothing to do with this case. The contract clearly states they shall have the right to inspect and [45] accept any amount less than the whole crop, if they do not measure up to the contract specifications.

I would like to state, also, at this time, if the Court please, that we move that Mr. Geschwill's

(Testimony of Fred Geschwill.)

testimony that he figured the hops were accepted be stricken. His mental processes are incompetent, irrelevant and immaterial in this action.

The Court: The testimony may stand, subject to the objection.

Mr. Kester: As far as the point we are concerned with here goes, whether the trade meaning of the word "acceptance" is admissible, I do not think what Counsel has said is in any way directed to that point. The contract uses the word "accepted" in numerous places; it does not define what constitutes the word "acceptance."

As far as the right of inspection is concerned, the evidence shows that they had samples nearly a month before they weighed them in and had ample opportunity to inspect those samples. This is merely going to a question as to what the proper practice is as to when hops are ordinarily, in the business, considered as accepted.

The Court: Have you pleaded custom?

Mr. Kester: I don't know as I am able to answer that at this time, your Honor. It was within the contemplation of the parties at the time and, therefore, I do not think any pleading on it would be required.

Mr. Hill: I believe I can enlighten your Honor on that. [46] There is no custom pleaded.

Mr. Kester: If the Court feels that——

The Court: No, I am not going to decide that

(Testimony of Fred Geschwill.)

for you. I am only interested in whether these people were taken by surprise.

Mr. Kester: If the matter of pleading custom should ultimately prove to be of any concern, we, of course, would like permission to amend.

The Court: That is not what I am interested in. I am interested in whether they were prepared to meet this issue.

Mr. Kerr: In fact, the deposition shows that plaintiff signed documents which waived any question of acceptance on that ground. In the documents it was agreed that the weighing and inspection of the hops shall not be deemed acceptance.

The Court: What document is that?

Mr. Kerr: It is a document which Counsel can describe.

Mr. Kester: He has not produced the document. It has not been marked for identification. We were permitted to examine it, but it was not marked at the time.

The Court: When was it signed?

Mr. Kester: It was signed somewhere about the time of this transaction. The whole point is, to lead up to the very thing he has suggested——

Mr. Kerr: My recollection is—Of course, I may be mistaken, but my recollection is that it was marked for identification.

Mr. Kester: I was not able to find it. [47]

Mr. Kerr: Of course, we will produce it if we have it.

(Testimony of Fred Geschwill.)

The Court: When was it signed? When did this man sign it?

Mr. Kester: We do not have the document. They have the document. It was signed at about the time that they were weighed in.

Mr. Kerr: It was signed prior to the weighing in, your Honor. No mention is made in that document of any custom.

The Court: What was the purpose of that document?

Mr. Kerr: Simply to protect the buyer against any possibility of contention by the grower that the act of weighing in, for the convenience of the grower could not later be claimed by other growers to be an acceptance of these hops. The document here in evidence will show the background, if that is required on the part of the buyer.

The Court: Go ahead. Develop your theory, subject to opposing counsel's objection. Ask another question. Start over again.

Q. (By Mr. Kester): What is and has been the trade practice, say, right in the hop business, as to whether or not weighing in the hops by the buyer is acceptance of the hops?

Mr. Hill: If the Court please, may all of this questioning be subject to our objection?

The Court: Yes. Go ahead.

Q. (By Mr. Kester): Do you have the question in mind, Mr. Geschwill? [48]

(Testimony of Fred Geschwill.)

A. After signing that piece of paper, Lamont came to me that morning——

Q. Let us leave the piece of paper out of it for the moment, Mr. Geschwill.

A. As long as I raised hops—I wasn't as many years as Byers or Paulus in the business—Whenever the hops was weighed up and each bale was inspected—if there was something wrong with that bale, it was throwed out; couldn't accept it if it was slack dry. When hops are scarce, they would say, "A hundred percent." And when they was plentiful they just fooled around and did most anything with the hops, but I never had that experience in my hops. In other words, they always went—Harry Hart always went through my hops, for example, and ripped every bale open to see if they was properly dried and had them weighed up, and the following day I had my money.

Q. What was the custom, generally, in the business with respect to whether weighing in was an acceptance of hops?

A. That was the custom; when they was weighed, when they went over the scale and there was nothing wrong with the hops—The ones they rejected, they naturally wouldn't weigh them at all.

Q. If they looked at a bale and it was unsatisfactory, they would set it aside and would not weigh it in? A. Would not weigh it at all, no.

Q. In this particular year, 1947, there has been some mention made of the paper you were required to sign. Did you sign a [49] paper?

(Testimony of Fred Geschwill.)

A. I did sign that paper.

Q. Did you get a copy of it?

A. I don't think I did.

Q. Do you know whether or not it was the general practice to do that?

A. Yes. I asked other dealers, other buyers, and they said they did it all this way, like that. They said, "You go ahead. It is just more convenient."

Q. Did Lamont Fry say they were requiring those signed papers from all of their contractors?

A. Yes.

Q. After the hops were weighed in on the 10th of October, what further conversation did you have with anyone representing Loewi about those hops?

A. Well, that same day we didn't have any, but later on, I believe, I went in the office and tried to get—We talked about hops and everything. That is what I come there for—I thought they had time enough now, and I didn't have my money yet, and I had to meet other bills.

Q. When did you next talk to Mr. Paulus or anyone representing Loewi about the taking of the hops?

A. I couldn't recall the exact date, but I believe I was in there once or twice—couldn't figure out what is the matter they didn't pay for them, so on the 29th I went in again. [50]

Q. The 29th of September, that would be?

A. Yes. No,—October.

Q. Yes. Pardon me. A. October.

(Testimony of Fred Geschwill.)

Q. The 29th of October.

A. The 29th of October I went in there again and talked to Mr. Paulus, and he happened to be right there in the office, and he said, "Come on in, Fred. Come into the sample room," and I went in the sample room and from the samples laying on the shelf he took some samples down and laid them on the table.

Q. Did Mr. Paulus at that time tell you about any communication he had had from the office of Hugo V. Loewi, Inc., about your samples?

A. Yes, he said there is—Mr. Paulus made the statement, he said, he didn't know how they come to do that.

Q. I am referring to Plaintiff's Exhibit No. 23, a letter from Hugo V. Loewi, Inc., to C. W. Paulus which states: "We find that samples of bales 70, 100 and 130 are decidedly better quality than the other ten samples. We are satisfied to accept delivery of any hops which run no worse than these three samples, provided they do not show more blighted burrs, but we certainly cannot accept any hops in the lot which run poorer."

Did Mr. Paulus talk to you about the contents of that letter?

A. Yes. He didn't explain the letter just like that, but he [51] mentioned it, like you say.

Q. Did he say there were some bales that Loewi was satisfied with?

A. Yes, and so we went through the whole lot;

(Testimony of Fred Geschwill.)

him and I looked—went through the whole lot, both samples, the lot represented by the samples. We looked at those, what he claimed, and then went back and looked at those samples they didn't want, and afterwards I asked him if he couldn't pick out what hops would satisfy Loewi, and he said, "No, I can't do that. They look to me all alike. There isn't enough difference in the whole lot."

Q. Was anyone there but Mr. Paulus representing Loewi?

A. Yes. I had a man with me. He had took me to Salem that day. That is where Mr. Paulus' office is, and he was along.

Q. Who was that? A. Mr. Faulhaber.

Q. Was there anyone else there besides you, Mr. Paulus and Mr. Faulhaber?

A. I don't believe there was.

Q. Was Mr. Paulus able to find any difference between Samples 70, 100 and 130 and the rest of the samples?

The Court: He has already answered that.

Q. (By Mr. Kester): Could any of you tell any difference between the samples mentioned in the letter you refer to and the whole run of samples?

A. No, we didn't. There may have been somebody in the office; [52] I wouldn't recall, but I didn't pay any attention because, after all, we went through the samples and Mr. Paulus made that statement himself.

(Testimony of Fred Geschwill.)

Mr. Kester: Counsel has produced the wire of October 24th from Hugo V. Loewi, Inc., to Mr. Paulus. The wire has not yet been marked. We would like to have it marked as Plaintiff's Exhibit No. 26. I think that would be No. 26, in the same sequence, anyway.

Q. What was the rest of the conversation with Mr. Paulus at that time?

A. After he said he couldn't see any difference in them, he made the remark, "Well, I am going to call up Oppenheim tonight, or someone, get him on the phone, but the way it stands now I believe I have to send you a letter to reject those hops," and then in two days I got a letter that the hops was rejected.

Q. That is the letter of October 30, 1947, marked as Defendant's Exhibit No. 3, I believe.

A. Yes.

Q. Do you recall about when you got that letter of October 30th, how long it took to arrive?

A. It might take two days, a day or two or two days.

Q. After receiving that letter of October 30th, in which they said they are rejecting your hops, Mr. Geschwill, what other conversation did you have with Mr. Paulus?

A. You mean after that? [53]

Q. Yes, after the rejection?

A. I still went in and told him about it, to get rid of those hops; I would like to have my money because I needed it pretty bad.

(Testimony of Fred Geschwill.)

Q. What did he say?

A. Well, he said, "Fred, I still try."

Q. Try to do what?

A. Try to sell them somewhere else, get rid of them; might find a buyer somewhere else besides Oppenheim.

Q. Did he say he was still trying to sell them to Oppenheim, too? A. I think he did.

Q. Do you know how many different conversations you may have had with Paulus after that along those lines?

A. They was pretty well related similar to that.

Q. Did you make any effort to go out and resell the hops yourself after they rejected them?

A. Yes, I did. I believe I took two or three samples and took them along home and showed them to some different people.

Q. Whom did you show samples to?

A. One sample, I believe, I showed to Mr. Harry Hart or one of his field men.

Q. Did you make an effort to sell them to him?

A. No, he couldn't take them. He had to draw samples, get big samples. They was split samples.

Q. You speak of "split" samples. I take it you mean a part of a sample?

A. A part of a sample. Part of a sample went back East and the other stayed in the office. I believe that is the way they do it.

Q. You had some split samples taken from Mr. Paulus' office? A. Yes.

(Testimony of Fred Geschwill.)

Q. Then you subsequently got some full samples?

A. After, I had one of Mr. Hart's men took some full samples.

Q. Did you subsequently resell the hops to Williams & Hart?

A. At the start I had a tough time to sell them, because when I went to Mr. Hart he said, "Fred, it is too bad. I still try to sell your hops but right now hops is getting along—They are all filled up."

Q. Did he make any reference to the Loewi contract, the Hugo V. Loewi contract, to your selling them?

A. We might have talked about it but he couldn't see why they don't took them hops. We figured they was just the amount they could handle——

Mr. Kerr: I will have to object to that.

The Court: Stricken. Go ahead.

Mr. Kester: Will Counsel stipulate that on October 31, 1947, the contract was recorded as a chattel mortgage?

Mr. Kerr: We will so stipulate.

Mr. Kester: In your efforts to resell the hops, did the [55] fact that the contract had been recorded as a chattel mortgage have any influence on your ability to resell them?

A. Well, yes, it did.

Mr. Kerr: I will object to that as a conclusion of the witness.

(Testimony of Fred Geschwill.)

The Court: He may answer. Go ahead.

A. All the other dealers didn't like to have a hand in there because there was $4,000 tied up and they are pretty well friends together and wouldn't want to have any bad feelings.

Mr. Hill: We will object to that, your Honor.

The Court: I will tell you: There are lots of things I don't know about, but I don't see how a man can deliver anything with a chattel mortgage against it.

Mr. Kerr: Yes, subject to the mortgage.

The Court: Subject to the mortgage?

Mr. Kerr: Yes, can be sold subject to the mortgage. To make a sale he had to obtain a buyer who was going to pay enough to satisfy the mortgage. All the buyer has to do is satisfy the mortgage, take subject to the mortgage. The chattel mortgage is simply for the purpose of securing payment of these advances.

The Court: When is it repayable?

Mr. Kerr: I will have to review the contract as to the date of repayment. It would be payable upon demand if the contract does not specifically provide the time for payment.

The Court: Well, we won't give too much time to that. [56]

Mr. Kester: May I just call your Honor's attention——

The Court: No, I don't want to hear you on that. Of course, when you say you can sell subject

(Testimony of Fred Geschwill.)

to a chattel mortgage, do you mean by that the chattel mortgage must be paid off?

Mr. Kerr: Yes.

The Court: That is what you mean by that?

Mr. Kerr: Yes, or it might be waived, for that matter.

Mr. Kester: I believe a lot of this can be short-circuited by explaining the actual situation that happened. I think we can simplify this in this way, that in the spring of 1948 Mr. Geschwill did sell the hops to Williams & Hart. At that time both parties being represented by counsel, an agreement was entered into that Geschwill would be permitted to take advantage of his chance to resell at such price as was then available. The market had gone down considerably. Out of the proceeds of the resale the sum of $4,000, which represented the advances which had been made, was required to be set aside, held more or less in escrow, to await the outcome of this case and the determination of whether or not the rejection was rightful or wrongful. If the Court holds the rejection was wrongful, then, of course, the proceeds will be credited against the judgment in favor of the plaintiff.

The Court: You are asking this man whether or not the fact there was a chattel mortgage hindered his selling the hops to someone else? [57]

Mr. Kester: That is right. And, as I understand it, he says that it did. It was necessary for him to enter into an arrangement permitting the

(Testimony of Fred Geschwill.)

amount of the chattel mortgage to be withheld, placed in escrow, before he could make a resale of the hops.

Mr. Kerr: May I clarify our position, your Honor, with respect to the rejection—to the objection raised to this line of questioning. If this witness testifies from his personal experience as to what actually happened in his attempt to sell the hops, that is one thing; but I think the last question related to what other dealers bought, related to something that there is no foundation for within the knowledge of this witness.

The Court: Ask the question so it will satisfy Mr. Kerr, whether he was hindered in the sale of the hops.

Q. (By Mr. Kester): For instance, in your dealings with Williams & Hart, did the fact that this contract was of record interfere with your being able to make a sale to them?

A. At an early date, yes.

The Court: Anybody else besides Williams & Hart? Did he try to sell them to anybody else?

A. Yes, I tried to sell them to Seavey.

The Court: Was the question of the chattel mortgage raised?

A. They would ask me, was there a mortgage; and as soon as I would say yes, then they wasn't interested in it. [58]

Mr. Hill: Whatever any other buyer said is strictly hearsay, your Honor.

(Testimony of Fred Geschwill.)

The Court: You are wrong about that, Counsel. There are lots of cases where you can tell what a third party said. He is speaking now about whether he was hindered in the resale of these hops to somebody else by the fact that there was a chattel mortgage. Of course, he has got to tell what the other fellow said.

We will recess now until 2:00 o'clock.

(Thereupon a recess was taken until 2:00 o'clock p.m.)

(Court reconvened at 2:00 o'clock p.m., Tuesday, January 25, 1949.)

Mr. Kester: During the noon hour, your Honor, Counsel produced some further documents and we have those given exhibit numbers. I take it the best thing to do would be to offer them as a body, as a group, and then they can be referred to later.

(Letter dated September 25, 1947, Hugo V. Loewi, Inc., to C. W. Paulus, was thereupon received in evidence and marked Plaintiff's Exhibit No. 27.)

(Letter dated March 30, 1948, Robert M. Kerr, to Roy F. Shields, thereupon was received in evidence and marked Plaintiff's Exhibit No. 28.) [59]

(Hop Contract and Chattel Mortgage, dated August 18, 1947, between Fred Geschwill and

(Testimony of Fred Geschwill.)

Hugo V. Loewi, Inc., was thereupon received in evidence and marked Plaintiff's Exhibit No. 29.)

(Letter dated September 26, 1947, Hugo V. Loewi, Inc., to C. W. Paulus, was thereupon received in evidence and marked Plaintiff's Exhibit No. 30.)

Mr. Kester: One of these, Exhibit No. 28, is not one which he produced, but is one which we produced and propose to discuss in the next few minutes. Counsel corects me. Some of them were produced prior to this noon, but were not marked before this noon.

With respect to Plaintiff's Exhibit No. 28, which is the agreement between counsel with respect to the resale of these hops to Williams & Hart—This relates to the subject of the testimony immediately prior to the noon hour—We are at this time offering that for the purpose of showing what the arrangement was under which the hops were sold to Williams & Hart after they had been rejected by Loewi, and I have the figures here as to the amount that was paid by Williams & Hart and, in the event of a judgment for the plaintiff, the amount of this resale should be credited against that judgment, because this amount has been realized from the hops. [60]

On April 1, 1948, Williams & Hart took 90 bales, net weight of 18,739 pounds, and paid $7,027.13.

(Testimony of Fred Geschwill.)

On April 16, 1948, Williams & Hart took the remaining 40 bales, net weight 8,241 pounds, and paid $3,090.38, a total of $10,117.51.

That was the gross amount of the resale. Out of that, pursuant to this settlement, Williams & Hart are now holding the sum of $4,000, which was the amount of the advances made by Hugo V. Loewi, Inc., to await the outcome of this case, and the balance, or $6,117.51, was paid to Mr. Geschwill.

Mr. Hill: The complaint does not allege the resale by the plaintiff. We knew about it, of course, but we were somewhat at a loss to know how to plead, but finally concluded not to mention it in our amended answer.

It seems to me, since they are relying on the agreement and the resale, we should be entitled to know upon what theory, what legal theory the resale was based and what they are now seeking to recover.

Mr. Kester: There is no secret about it. It is a fact. The resale was not made until after this case had been filed, and that is the reason it is not mentioned in the complaint; that is why it was done by a stipulation of counsel.

I might say that this stipulation, originally prepared by Mr. Kerr, provided the sale shall be without prejudice to the rights of Hugo V. Loewi, Inc., and it contained the clause that [61] no reference to the resale should be made in this court except as the Court might, of its own initiative, require.

(Testimony of Fred Geschwill.)

Subsequently that agreement was modified because it was quite apparent that the Court would have no evidence on that, and it was modified by being deleted from this agreement. That notation has been made on this stipulation.

As far as the legal theory is concerned, the Oregon hop cases hold that when a buyer has wrongfully rejected hops, the seller has the right of reselling them and applying the proceeds of the resale against any liability that the buyer might have by reason of failure to perform the contract.

Therefore, if the rejection was wrongful, we have minimized the damages by some $10,000 by reselling them, and the defendant here would be entitled to a credit against their liability.

We have prepared a memorandum of some of the authorities dealing with some of these points which we will hand up to the Court and to Counsel, for such help as it may be during the progress of the trial. There is nothing particularly involved about that.

Mr. Hill: I think we are entitled to know what damages they are seeking to recover, whether they are trying to recover the price under the uniform sales law and credit us with the amount of the resale, or whether they are proceeding on some other theory. [62]

Mr. Kester: Yes. The complaint is very clear on that. It is an action for the contract price. They are entitled to a credit for $4,000 in advances that

(Testimony of Fred Geschwill.)

they made, but it is an action for the contract price.

Mr. Hill: Then, if the Court please, I think we should be entitled to amend our answer to allege that plaintiff did not use reasonable care and judgment in making the resale pursuant to the sales act. If they are now alleging a sale, I think we are entitled to allege, within the meaning of the sales act, reasonable care and judgment was not used by the plaintiff; I think we are entitled to a statement in their pleadings as to exactly what their theory is and exactly what they contend for the resale. That was not forthcoming, so we did not anticipate the defense in our answer. We do now believe that we should be permitted to amend, if your Honor is willing to accept this oral statement as an amendment of his complaint.

Mr. Kester: We have no objection to their raising the issue as to whether or not this resale was reasonable under the circumstances. I think that is perfectly proper.

Mr. Hill: We also have a memorandum of authorities, your Honor. We can hand that up to your Honor.

Mr. Kester: Shall we proceed now?

The Court: Yes. [63]

(Testimony of Fred Geschwill.)

Direct Examination

(Continued)

By Mr. Kester:

Q. Mr. Geschwill, I believe before the noon recess you were referring to efforts made to resell the hops. You mentioned Williams & Hart. Did you attempt to sell the hops anyplace else?

A. Yes, I believe I tried—I asked Mr. Seavey.

Q. What did Mr. Seavey have to say?

A. I can't just recall what he said. He said he was pretty well filled up and maybe later on in the spring he might want them.

Q. Did Mr. Seavey indicate whether or not the hops were of satisfactory quality, if he had a place for them? A. Oh, yes.

Mr. Hill: That is strictly hearsay.

The Court: Objection sustained.

Mr. Kester: It was my theory in asking that question that Counsel now has raised the question whether or not the resale was reasonably made.

The Court: He has to assume the burden of that. You can come back to it in rebuttal.

Mr. Kester: Very well.

Q. To whom else did you offer these hops?

A. I also went up to the Lucky Lager brewery.

Q. To whom did you speak there? [64]

A. Talked to Schwind.

Q. Do you recall anybody else you offered these hops to?

(Testimony of Fred Geschwill.)

A. I don't know. I believe we made a trip to Washington to find out what the market was.

Q. You mean the State of Washington?

A. The State of Washington.

Q. Whom did you consult with up there?

A. Mr.

Q. What is his affiliation?

A. He represented the Co-op in the State of Washington, in Yakima.

Q. The Co-operative around Yakima?

A. Yes.

Q. This price you received from Williams & Hart, what was the per-pound price?

A. The 1st of April, that time I got 37½ cents a pound.

Q. 37½ cents a pound. At that time was that the going market price for prime hops of the 1947 crop? A. Yes.

Q. Was that the best price that was available at that time for prime hops?

A. Yes, that was the best price that was available. As a matter of fact, some hops sold for 30 cents.

Q. Were there any that sold at other prices that you know of?

A. Some hops sold for less than that, quite a bit less than [65] that.

Q. Some sold for less than what you got?

A. Yes.

(Testimony of Fred Geschwill.)

Q. Referring to your 1947 crop of cluster hops, Mr. Geschwill, were those harvested in a careful and husbandlike manner? A. Yes.

Q. Were they cured in a careful and husbandlike manner? A. Yes.

Mr. Hill: I submit, your Honor, these questions are leading and highly improper.

The Court: Sustained. They are not improper; they are leading.

Q. (By Mr. Kester): Would you describe the harvesting, curing and baling of the 1947 cluster hops? A. You mean the packing and all?

Q. Well, will you state whether or not they were properly harvested? A. Oh, yes.

Mr. Hill: That is a leading question, too.

The Court: Sustained. Just tell what you did. Tell us a little bit about it.

A. I dried them—First, I picked them right, dried them—tried to get them as green as I possibly could in picking.

Q. (By Mr. Kester): Did you dry them in a manner that was customary in the hop business at that time? [66] A. Yes.

Q. I think you have already described the curing and baling. Were there any other liens and encumbrances on this crop other than the chattel mortgage that has been referred to here?

A. No.

Q. What type of baling cloth was used. Was it the regular——

(Testimony of Fred Geschwill.)

A. It was the regular baling cloth, what they demanded.

Q. Were these hops of the first year's planting?

A. No.

Q. Were they affected by——

Mr. Hill: If your Honor please, Counsel persists in asking leading questions.

The Court: That is not leading. He can say yes or no in answer to that.

Mr. Hill: Many of the previous questions have been leading and I have not objected to them.

The Court: Mr. Hill, don't make too many objections. In a case without a jury whether or not a question is leading or not is not of so much importance. Go ahead. Don't lead if you can avoid it, Mr. Kester.

Mr. Kester: I will try not to, your Honor.

Q. Were they affected by mildew?

A. No.

Q. Were they of prime quality? A. Yes.

Q. Were they in sound condition?

A. Yes.

Q. Were they of good color? A. Yes.

Q. Were they fully matured?

A. Fully matured, yes.

Q. Were they cleanly picked? A. Yes.

Q. Were they free from damage by vermin?

A. Vermin? You mean——

Q. Vermin. What does that mean in the hop trade? A. I think it is lice.

(Testimony of Fred Geschwill.)

Q. Lice?

A. Yes. That is a bad thing to have in hops. They was clean. They was completely——

Q. Was there any damage by lice in them?

A. No damage at all.

Q. Or by any other kind of vermin?

A. No.

Q. Were they properly dried? A. Yes.

Q. Were they properly cured? A. Yes.

Q. Were they properly baled? A. Yes.

Q. Were they in good order and condition?

A. Yes.

Q. Did anyone else have any prior contract on your 1947 crop? A. No.

Q. With respect to these visits that you made to other people for the purpose of reselling, did you have samples with you when you made those visits?

A. I don't believe I had samples with me, but I told them to go out and take some. I believe some of them had some in their office.

Q. For instance, who?

A. Seavey had some hops.

Q. Did you have his own samples of your hops?

A. Yes, he went out and got his own samples.

Q. Did you take samples to the Lucky Lager people? A. Oh, yes.

Q. Did you take samples to any of the other people you mentioned?

A. Well, yes, in Washington.

Q. You took samples up there? A. Yes.

(Testimony of Fred Geschwill.)

Q. Were those samples which you took a part of the regular samples of your crop that had been taken at that time? A. Oh, yes.

Q. Had they been taken in the ordinary manner for sampling hops? A. Yes. [69]

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. The first crop of hops you ever produced was the 1943 crop, is that right? A. I think so.

Q. Do you recall definitely whether or not that is a fact?

A. Well, it could have been in 1943. Understand, that was when we started in hops. It takes one year to plant this yard and cultivate and the second year they produce.

Q. Then was it 1943 or 1944 you produced your first crop of hops?

A. I believe in 1943. Of course, it has been so long ago.

Q. In other words, you are sure you had not produced any commercial crop prior to 1943, is that right?

A. If I raised any, naturally it was to sell, because when I planted my yard I contracted my yard, my hops right then. If I would have raised any that year, Hart would have got them—60 or 70 bales of baby crop.

Q. What year would that be?

(Testimony of Fred Geschwill.)

A. It must have been in 1943 or 1944. It was in those years.

Q. It was either 1943 or 1944 that you raised the first crop, is that right? A. Yes.

Q. Before 1943 you never had grown a crop of hops? [70] A. Not of my own.

Q. Did you grow them on any other property?

A. No.

Q. This cost of production of 55 cents a pound, that was for what year? A. 1947.

Q. Is that just an estimate on your part, or is it based on books and records?

A. Just on my own part, because that just was the year labor was scarce.

Q. That is just an estimate on your part, is that right? A. Yes.

Q. You stated your 1947 crop of hops was machine-picked? A. Yes.

Q. When your hops were machine-picked, how were they handled from the time they were growing in the yard to the time that the picking was completed?

A. Well, the truck comes in the yard, and we load the vines on, and then there is some kind of tool that is made to fit the machine, to feed them in.

Q. Were the hop vines first cut off?

A. The hop vines were first cut off, on the bottom about three feet above the ground and then on top, and then they would be loaded onto the truck and hauled to the machine, and there is a man there

(Testimony of Fred Geschwill.)

that feeds them through the machine, and the machine [71] picks them and separates the vines from the hops, and the leaves and stems.

Q. Then what was done with your 1947 crop of hops after they had gone through the machine, the picking machine?

A. Well, they was dried, then, after they was picked.

Q. Who dried them?

A. I dried what I could, about half,—I would say about half of the crop,—and the other half, the College dried them in their kilns, because I didn't have enough capacity at my place.

Q. What College do you refer to?

A. Mt. Angel College.

Q. The hops which the Mt. Angel College dried, were they clusters or fuggles?

A. It was clusters and fuggles, both; split the crop in half, because the hops had been picked so fast with the machine; like I said before, we couldn't take care of them on my kiln so we had to use the College storeroom and kilns to dry them out.

Q. When were the hops, both fuggles and clusters, baled?

A. When they was dry. For the half dried in the College, it was baled right there, and when they were baled at home, at my own hop house, they was baled and dried there.

(Testimony of Fred Geschwill.)

Q. You say approximately 65 bales of clusters were dried and baled at the College?

A. Approximately, yes. I wouldn't say it was——

Q. What was done with these hops, dried and baled at the [72] College, after the completion of the baling there?

A. They was hauled to the warehouse, Schwab's warehouse in Mt. Angel.

Q. These particular hops never did go back to your own yard, to your farm? A. Pardon?

(Question read.)

A. No.

Q. At the time you cut off the vines for loading onto the truck to be hauled to the picking machine, did you cause all the vines to be cut off, or just some of them?

A. All the vines with hops on.

Q. Is that true as to the fuggles?

A. That is true in the fuggles.

Q. Is that true as to the clusters, too?

A. Yes.

Q. In other words, you harvested—that is to say, you cut off the vines of all clusters?

A. Yes.

Q. And loaded all those vines onto the truck for transportation to the picking machine, is that right? A. Yes.

Q. Then, would you say you harvested the entire crop of clusters which you produced in 1947?

(Testimony of Fred Geschwill.)

A. Yes. [73]

Q. Then you made no effort to avoid harvesting such of the clusters as were then affected by mildew, is that right?

A. Yes, I made no effort; it could not be done whatsoever. I had a good yard to that extent, and I wasn't worried a bit. There was nothing I could do about it because in 1947 we had all a patch of mildew which I mentioned before, and we went ahead and picked them all.

Q. Did I understand you correctly to say you had a touch of mildew throughout the cluster yard?

A. We had a slight touch of mildew, yes.

Q. What do you mean by "a slight touch of mildew?"

A. Well, there is a bad heavy mildew—a bad heavy mildew could come early in the growing stage and then you would not get any hops at all, because the vines—couldn't even get them drawn up to their wire, because hops had to climb 18 feet, and they wouldn't make two feet if the mildew is bad; just smother in the ground.

Q. That would be the situation, would it, where the mildew hit early enough? A. Yes.

Q. To prevent the vines from growing, is that right? A. Yes.

Q. Will you proceed?

A. Then if you still find that mildew, you keep on dusting, after you get your hops so that the vines go up the string, so [74] they climb up, simi-

(Testimony of Fred Geschwill.)

lar to beans or anything else that have to get up off the ground. You protect them the best you can so you will surely get some hops.

Q. What kind of hops?

A. Well, we try to raise the best hops we could. Any farmer would who takes that much pride in his job.

Q. Will you proceed with your description?

A. It happens some yards got hit real early, I would say in June or July, with some mildew, and I had mine protected enough I didn't have no damage that year.

Q. This year you contend you had no damage?

A. I would say in June sometime——

Q. In 1947? A. 1947.

Q. In June you had no mildew at all in your yard? A. No.

Q. When did you first detect the presence of mildew in your cluster yard?

A. I kept on dusting right along and still the weather was so bad it affected it a lot. Later on, as the hops growed and matured—not bad enough to hit any quality in the hop.

Q. Do you recall when you first noticed mildew in your cluster yard?

A. I would say about the 1st of August.

Q. Will you describe the mildew which you saw at that time? [75]

(Testimony of Fred Geschwill.)

A. Well, wasn't much to describe. It wasn't very much in it. Sometimes I thought it was wind whip or something similar to that; it acted the same way, but a lot of those hops was in bloom, but didn't enough bloom make hops—kind of held my crop down; where I should have had eight or ten bales to an acre, I got six and a half.

Q. When you first noticed mildew in your cluster yard, the 1st of August, did that affect the hops themselves as distinguished from the vine?

A. Not that year, not '47.

Q. That is, to any extent at all? A. No.

Q. To no extent at all on August 1st?

A. No.

Q. Were the hops themselves affected by downy mildew?

A. Well, as I said before, they had a touch, but the lupulin was matured and the seed was in and it didn't affect the growing hop at all.

Q. Did you notice any hops that had not fully matured?

A. There was some later hops started in growing again after the weather got a little better; they didn't make as big hops as the first ones.

Q. Those were clusters?

A. Those were late hops, yes.

Q. On what date was it you noticed some of the late clusters [76] were not fully developed?

A. Oh, I would say the 15th.

Q. The 15th of August?

A. Yes. It still kept on growing. As a matter

(Testimony of Fred Geschwill.)

of fact, they growed until picking time, but they didn't come on as far as they should have, from the 1st of August up to that.

Q. Did the mildew get any worse after August 1st? A. No.

Q. Did you notice at any time in your yard hops which had not fully developed because of mildew?

A. Yes, there was a few.

Q. What do you call "a few?"

A. Oh, scattered vines; could be one or two hops hanging there. You would see some of them just like on an apple tree; you find smaller apples sometimes.

Q. What was the color of these immatured hops? A. That is a reddish-looking hop.

Q. In fact, it is a deep brown, isn't it?

A. Well, I wouldn't call it a dark brown. It is something that is still—I don't know. We have experts here to explain that better. It is a hop that is not as big as a standard hop may be; that is, it is stunted by the weather.

Q. Could you make any estimate of any percentage as to the downy mildew?

A. I estimated it would be about five percent; it could have [77] been more, but by the time it goes through the machine, they would be kicked off by the fingers of the machine and go out onto the junk; would not get in the bale at all, but there will be some that will get in the bale.

(Testimony of Fred Geschwill.)

Q. You estimate that five percent of your cluster crop was affected by mildew, as of what time?

A. Sometime in the middle of August.

Q. Say about August 15th? A. Yes.

Q. At that time you estimate that your cluster crop was affected, that five percent of your cluster crop was affected by downy mildew?

A. Yes, what showed there, besides the earlier stage, what on the 1st of August didn't come up to bloom at all.

Q. It might have been more than five percent then?

A. That is pretty hard to figure out. It might be less.

Q. Describe to the Court, please, how that five percent or more of the cluster crop, as of August 15, 1947, appeared?

A. What was the appearance of it?

Q. What was the effect of the mildew on these hops?

A. Well, like I said before. Them nubbins, what you call them, in your hop—Of course, there is a variation there. If I would have picked them by hand, I would have got them all in the basket. Naturally, a picker would grab anything to make weight, but in a hop-picking machine it is possible for them to go through [78] those screens, and the heavy stuff stays, and the small stuff goes out in the junk, a big percentage of it.

(Testimony of Fred Geschwill.)

Q. Describe to the Court what you refer to as nubbins.

A. Well, a nubbin, like I said before, it is mildewed; it doesn't live any more—It has no life in it any more; it is dead.

Q. Is that a small hop cone which has not been fully developed because of mildew?

A. Yes, similar to that.

Q. As distinguished from a fully developed cone, unaffected by mildew?

A. Sometimes, yes. They don't have no sap in it, no moisture in it, just dried up.

Q. Mildew which causes the appearance of those nubbins is mildew which hits the hops early in the season, that hits the hop cone so early that the development of the cone is stopped?

A. Not exactly; I wouldn't say all the time. Like in the early stage, like I said before, it will show up in the early stage and still grow and produce a clean hop. It gives more strength, then, to the new vine than to the old one.

Q. Mildew which appears on the petals of a fully matured hop is mildew which hit that hop late in its development, called late mildew, is it not?

A. Well, I would say on the 15th of August it was pretty well developed; was more or less to the finish. [79]

Q. Would that be before or after blooming?

A. I mean, during the blooming stage.

Q. You said 1947 was a bad year for mildew.

(Testimony of Fred Geschwill.)

What did you mean by that, a bad year for mildew?

A. Well, everybody had mildew, everybody. That is why the market went so high, a shortage of hops.

Q. That is to say, a shortage of hops which were not affected by mildew, is that right?

A. Oh, all affected by mildew. Like I said before, it didn't affect the hops at all, I would say.

Q. Did you see the hops produced in 1947 after they were in bales? A. Yes.

Q. Did this mildew damage appear in these baled hops?

A. To a slight extent, yes; it did show some.

Q. Describe to the Court how that mildew damage appeared in the baled hops.

A. Well, it will show some of those nubbins what I have spoken about before. There will be some in the samples but not enough to amount to anything because, after all, one year they took nearly all, even where they had lice and the hops was black; they wanted them so bad.

Q. You said at the start of the season you had a good set. That would be on what date?

A. Pardon? Pardon? [80]

(Question read.)

A. At the start of the season, from April 1 up to August, a perfect set.

Q. How large a crop did you estimate you would have at that time?

(Testimony of Fred Geschwill.)

A. At that time, oh, my guess was about eight bales.

Q. Eight bales to the acre? A. Yes.

Q. What was the total baled production finally per acre? A. Six and a half.

Q. I believe you said, or indicated, at least, that the nubbins show in any sample. Do you mean to say you have never seen a sample of hops in which nubbins did not appear?

A. No, I wouldn't say so.

Q. Have you seen any 1947 hop of cluster-hop samples in which nubbins did not appear?

A. No.

Q. You had never seen them?

A. No. They might have some. In Washington they didn't have any; I seen some samples in Washington and they had no nubbins at all.

Q. Those in the State of Washington were late cluster hops, is that right? A. Yes.

Q. Do you know of any Oregon grower who, in 1947, had no mildew [81] in his yard?

A. There was a few, but I don't know them. I didn't see those yards.

Q. You referred to the lupulin content of hops being affected by early mildew. Did you refer to the nubbins in that connection? Did you mean to say, in other words, that the nubbins would not have lupulin?

A. A nubbin could not have lupulin—might have some, to some extent. We had an analysis made of

(Testimony of Fred Geschwill.)

some of these hops as to how much lupulin they have in there, the percentage, and it come out very satisfactory, because it had more lupulin, a richer quality of hop than the year before, although the hop didn't look as green and nice as 1947.

Q. You said Mr. Paulus looked at your hops at the picking machine. Do you recall the date?

A. I said Mr. Paulus talked to me at the picking machine. I am sure he had looked. I didn't see him when he looked, though.

Q. What was the date of that?

A. I believe it was on the early hops in August. It was on the 12th of August, I believe.

Q. You believe it was fuggles that he looked at at that time? A. Yes.

Q. And not clusters?

A. Not in my presence. All I knew was he was making trips all over the State of Oregon, him and Mr. Oppenheim. That has been [82] told me. They looked at all of the yards. They know what the hops looked like.

Q. Did Mr. Paulus or Mr. Oppenheim ever tell you they had looked at your cluster crop?

A. No.

Q. Then you don't know whether Mr. Paulus or Mr. Oppenheim looked at your cluster crop or not?

A. No.

Q. Did I understand you correctly to say that the grower's market price provision, which appears in your cluster contract, appeared in the 1947 con-

(Testimony of Fred Geschwill.)

tract or appeared in 1947 for the first time in the hop industry? Is that what you meant to say?

A. I don't get that right.

Q. Do you know whether or not the grower's price provision in your 1947 cluster contract had been used in other contracts in other years?

A. It had been used similar to that. They had a five-year contract, either floor or you could take the grower's market. Some other companies had it and I imagine Oppenheim had it, too.

Q. So you know that that provision appeared in contracts before 1947?

A. Some years, yes, but it didn't have any effect on the price because Oppenheim set the price.

Q. When Mr. Byers came to your farm, August 18th, was that in the morning or at night? [83]

A. I think it was in the morning.

Q. Was it at that time and place that you signed the cluster contract?

A. I think I did, yes.

Q. Did Mr. Byers at that time go out in the cluster yard?

A. Not in my presence. He might have before I seen him, or after. I don't know. I didn't ask.

Q. Do you know whether or not Mr. Byers ever saw your clusters growing in the yard?

A. It is customary when a man brings money out. The last three or four years he always went in the yard before he handed me the check.

Q. As far as you know, that was not done in 1947? A. I wouldn't know.

(Testimony of Fred Geschwill.)

Q. I will ask you to look at the cluster contract which is in evidence and call your attention to the estimate of your cluster production or cluster crop of 20,000 pounds at that time. Do you find that in the contract?

A. Yes. I will tell you how that come. For three years previous, before, I had a 20,000-pound contract, and I just took it the same way because—We always raised fifty and better thousand pounds in my yard, but my contract reads 20,000 pounds, and it was so close to the finish that any amount would be satisfactory to the company, if it was only five bales or would be two or three hundred bales. [84]

Q. So, the estimate of 20,000 pounds of 1947 clusters was your own estimate?

A. That was our guess, yes.

Q. What do you mean by "our guess"?

A. Well, we say any amount. We always want to raise more, if we can, and you always want to underestimate your yard instead of stretching it.

Q. Then the 20,000 pounds was your estimate of your total cluster production on August 18th, is that right?

A. Well, I don't know. I imagine Fry and—We talked about it.

Q. Do you recall when you and Mr. Fry talked about it?

A. It was on the 17th of August, in the evening. He wanted to know what hops we had.

(Testimony of Fred Geschwill.)

Q. Was it at night Mr. Fry came out to your place on the 17th?

A. Yes, it was after dark.

Q. And at that time he did not go out to the cluster yard, did he? A. No.

Q. Did you tell him at that time you thought your 1947 production of cluster hops would be about 20,000 pounds?

A. Yes. I thought it was close enough to tie the deal at that rate.

Q. That would be how many bales per acre?

A. That would be five bales per acre. [85]

Q. Five bales per acre? A. Yes.

Q. In making that estimate, were you attempting to estimate the total production of all hops or just those hops in good condition?

A. We estimated it; just a guess, rather, because you never could tell right what your hops will be and how they weigh up; like grain and everything else, some years your grain weighs more than others; and we was fortunate in that year that we had a rich hop, lots of lupulin in it, and they weighed good.

Q. I believe you stated that on August 1st you estimated you would have about eight bales per acre, is that right?

A. That was the growing stage, then, but it didn't stay on. We have years that a cherry tree brings you more cherries than others, when they drop off. It is similar in your hop field.

(Testimony of Fred Geschwill.)

Q. On August 18th your estimate of about five bales per acre took into account the presence of mildew or the damage caused by mildew?

A. No, didn't figure the damage at that time; didn't figure it at all because it wasn't bad and, after all, I figured that maybe Lamont seen my hopyard, and if he didn't think it would produce that amount he could have come out and looked at the yard, because it is his duty to come out and look at a farmer's yard before he even contracts the hopyard.

Q. At the time you talked to Mr. Fry on August 17th, did you [86] say anything to him about mildew in your yard?

A. Oh, yes. He knew it. It was all over.

Q. Did you say anything to him?

A. I don't think I mentioned it, because it would not have been mentioned because, like I say,——

Q. At that time nothing was said about downy mildew in your cluster hops? A. Pardon?

Q. On August 17th, when you and Mr. Fry were together at your hopyard, at your hop farm, nothing was said about downy mildew in your yard?

A. I don't know what he said, really, that night because he wanted them hops so bad; he was after those hops; he wanted those hops. I believe if I had asked a 90-cent floor he would have took it.

Q. When buyers came out with the contract form on August 18th, did you say anything to him about mildew in your yard?

(Testimony of Fred Geschwill.)

A. I don't remember nothing, because we had only five feet to look over a fence and he would have seen the yard.

Q. Could he have seen the entire cluster yard, if he had wanted to?

A. Oh, if he wanted to see the entire yard, yes. I think he could have walked in the yard; he couldn't help but see my hopyard.

Q. Do you know whether Mr. Fry at any time looked at your [87] cluster crop in the yard?

A. No.

Q. Do you know whether Mr. Oppenheim at any time looked at your cluster crop in the yard?

A. No.

Q. You don't know? A. No, I don't.

Q. You referred to the procedure followed in drying the hops after they had been removed from the fields. A good hop can be ruined in the drying process, can it not? A. Oh, yes.

Q. By slack drying?

A. By slack drying or high drying.

Q. What do you mean by "slack drying"?

A. If you don't dry them enough so they have too much moisture in them.

Q. And high drying is what?

A. You put too much heat on and burn up your lupulin.

Q. Is there such a thing as sack burn?

A. No, I never heard of it.

Q. Well, it is in the damage to the hops in the

(Testimony of Fred Geschwill.)

handling, as pickers take them from the vine and put them in the sacks.

A. Yes, but in this case it wasn't because the hops was run in from the hopper into the sack in the kiln, and some of these sacks was hauled to my home place and then lifted up in the kiln [88] again and dried.

Q. Was there ever any damage in handling of them after they had gone through the picking machine and while being taken to the place for baling or storing?

A. No, I don't think so, but they could be damaged when you have got lots of pickers in the yard and people are picking by hand, and they have lots of kids playing around in the yard or standing on sacks of hops, but I had no children around my sacks and neither did I pick by hand that year. But you could damage your hops that way.

Q. What do you mean by curing the hop?

A. To cure is to dry your hop; that is when I bring the hops up in the kiln, when I take the moisture off or out of the hop.

Q. Is that before or after they are put into the kiln?

A. I have to put them in the kiln first in order to cure them, just like you put your meat in a smokehouse to smoke it.

Q. Is that part of your drying process?

A. Yes, part of the drying process when you put them in there.

(Testimony of Fred Geschwill.)

Q. What other damage might result to the hops while being dried or cured?

A. Well, it would cause damage if we did not dry them entirely; if they have too much moisture and then bale them, they would get hot in the bale and burn up; they would eat themselves up. That would affect the lupulin inside, if I put too much heat on in the kiln and my hops would scorch—would scorch them quite a bit [89] or might burn.

Q. Then you have to handle your hops very carefully to make sure that you get a baled crop that is in good condition? A. That is right.

Q. It requires skill and experience?

A. That is right.

Q. The mere fact that you have a good set on the hops, a good quantity of good quality hops on the vine, does not necessarily mean you are going to have good quality hops in the bale?

A. You could spoil them in the hop house, if you don't dry them right.

Q. You referred to a telephone conversation with Mr. Paulus relative to the market price at the time and before you selected the grower's market price. Do you recall the date of that?

A. I believe I had it that morning.

Q. That would be the same date as your selection of the market price? A. Yes.

Q. Did your fuggle hops have any damage?

A. They had no—slight mildew damage also that year, yes.

(Testimony of Fred Geschwill.)

Q. What extent of mildew damage did you estimate your 1947 fuggle hops to have?

A. I couldn't tell you that because I didn't pay enough attention.

Q. As a general rule, fuggle hops are not as susceptible to [90] damage as clusters?

A. No, that is right.

Q. Would you say you had less downy mildew damage on your fuggle hops?

A. No, it is pretty hard—You might have two fellows out there arguing about mildew and one would say, "That is wind whip," and the other one might call it mildew. In that late stage I had some wind whip in my fuggles. That comes from hitting against the hop post, where the wire is raised up.

Q. Did you have any wind whip damage in the clusters? A. Oh, yes, always.

Q. How much, in comparison to the fuggle crop?

A. That I couldn't say.

Q. Would you say you had less mildew damage in the fuggles than you had in the clusters?

A. No, I think just as much—You mean mildew damage?

Q. Mildew damage, yes.

A. At the last, I did get a little, but my hops didn't get big enough. Where I had had ten bales to the acre I only got seven or eight bales that year and I run short twenty-five or thirty bales.

Q. Did you harvest your entire fuggle crop?

(Testimony of Fred Geschwill.)

A. Yes.

Q. Was that short crop due to mildew damage?

A. Well, it stopped the hop from growing, like I mentioned before. [91] Some years hops don't get as big, where you really have a big hop, but it is not always so that a big hop is the richest hop.

Q. Were these nubbins in the fuggles as well as the clusters?

A. I think were was a few in it. I can't recall.

Q. As many as in the clusters?

A. No, I don't think there was quite that many.

Q. I believe you said each bale of the cluster hops was sampled on behalf of the buyer to see if the hops were properly dried. You referred to tryings? A. Yes, that is what it is.

Q. As a matter of fact, that sample is not merely for the purpose of determining whether the hops are properly dried?

A. Well, it is to see if you have any hops in the bale at all when they look at samples. You might have maybe 20 percent leaves and stems in there. The Government looks into that and I take his report.

Q. And you might have 50 percent mildew damage?

A. Then they wouldn't take them; nobody would buy them.

Q. Would you have picked your cluster hops if you had 50 percent mildew damage?

A. No, except that they are never that bad.

(Testimony of Fred Geschwill.)

Q. Did anyone ever tell you to pick your cluster hops?

A. No, and I didn't ask anybody because I seen the other yards and I was still proud of my yard. I thought I had a fairly good yard that year, 1947.

Q. You picked your cluster hops in 1947 on your own initiative?

A. No, I talked it over with different hop growers who looked at my yard. They went back and looked at their own, too, and said I was lucky that I didn't get a hop that is bad.

Q. You never talked about that to Mr. Fry, did you?

A. No, that was up to him to go out and see that, too.

Q. You never talked about that with Mr. Fry, did you? A. No.

Q. Or with Mr. Paulus? A. No.

Q. Or with Mr. Oppenheim? A. No.

Q. Or anybody else representing the Hugo V. Loewi, Inc.? A. No.

Q. As a matter of fact, were any tryings taken of the cluster hops for the purpose of determining whether or not they were according to contract quality?

A. I figured they was contract quality.

Q. But the purpose of taking tryings is to find out whether they come up to contract quality?

A. From my past experience, I figured I had a No. 1 choice hop for that year, because years before

(Testimony of Fred Geschwill.)

that they had hops get brown—used to take everything—rats and mice even making a living in there and there was lice and hops was black, and those buyers, they wanted the hops so bad they bought all those hops and paid [93] a premium for them.

Q. This conversation you refer to with Mr. Fry when he told you that you had one of the nicest crops he had seen, where was that?

A. The first remark he made, he was out in my place to look at the hops.

Q. When was that?

A. That was sometime during the picking. I wasn't home. I was out on the machine.

Q. Where was it on your farm? Was it in the hopyard?

A. It was in the hopyard and in the hop house, right adjoining, right over the fence.

Q. Was it in the hop house that he made that statement?

A. I wasn't there when he made that statement. He met me in town. It was either up by the hop-picking machine or somewheres in Schwab's warehouse. He told me he was out and seen the hops and he says, "You done a good job. They look fine. They look swell."

Q. When was this?

A. It seems to me about the 1st of September.

Q. Where was it that he made that statement to you? Was that in Mt. Angel?

A. I would say in Mt. Angel. I can't recall the

(Testimony of Fred Geschwill.)

exact place. It could have been up in the hop house —I mean by the hop-picking machine, or it could have been in the warehouse, or somewheres [94] around down there.

Q. Some place around Mt. Angel?

A. That is right.

Q. Mr. Fry told you that he had been out to your place and looked at your hops and they looked fine, is that right? A. Yes.

Q. Did he say what particular hops he was referring to?

A. Couldn't be nothing else but the late hops because the early hops was taken care of on—I don't know—the 14th or 15th in August.

Q. Was that before or after the harvesting of the clusters? A. The late clusters?

Q. The late clusters.

A. It was right during the harvest because——

Q. I beg your pardon?

A. It was right in during the harvesting, when I was picking the hops.

Q. Did he say whether he referred to the hops you had up in the hop house or whether he was referring to the hops which he saw elsewhere?

A. Well, when he spoke about hops, he must have talked about the hop kiln—He must have seen some hops on the kiln in the storeroom. He must have looked at the hops because he made me the compliment, "You have got nice hops."

Q. Did he refer to hops that had been dried? [95]

(Testimony of Fred Geschwill.)

A. Yes, I believe he also mentioned that. He made some remarks. He must have seen the hops; must have seen some hops that was drying in the storeroom. I don't know just what he said, but all he meant is that it was all right, that it was fine.

Q. You don't recall the exact date of that conversation?

A. No, I don't. I don't know if it was the same day when he talked to me or the day after that he was at my house.

Q. It was sometime in September, was it?

A. Yes, I think it was during picking time.

Q. Was that the conversation you referred to in your previous testimony this morning or in another? A. That is in another.

Q. What other time did he mention your hops to you?

A. On the 10th or 12th. I forget now when we received those hops.

Q. That was October.

A. October. He took those and he opened every bale, punched every bale to see if they were properly dried or if there was something wrong with them, and he would have let me know right then and kick the bales out. He took samples, every ten bales, like 10, 20, and so on. I asked him how they looked. "Fine. That is the best hops I have ever received this year," or "One of the best-looking hops I took in this year," some kind of a remark he made like that.

(Testimony of Fred Geschwill.)

Q. That was in Schwab's warehouse? [96]

A. In Schwab's warehouse, yes.

Q. Who was present at that time?

A. Jim Fournier.

Q. What was he doing there, if you know?

A. I don't know what he was doing there exactly, but he was talking about hops and everything. I don't know what his intention was in that hop house, but as a rule that time of the year—He is manager of the bank and he goes to the hop house every day. That is where his money is tied up.

Q. Was he the only person present other than yourself and Fry?

A. I think Leo Schwab was there, one of the Schwab boys connected with the warehouse.

Q. He was connected with the Schwab warehouse? A. Yes.

Q. Was there any other occasion when Mr. Fry made any comment to you about the quality of your hops?

A. No, I believe that is the last time we talked about a deal, was that day.

Q. Did you have any conversation with him after that day concerning the quality of your hops?

A. I don't think so, except in case that he was standing there with Mr. Paulus, but we wasn't talking too much about hops.

Q. Will you look at the document which has been marked Defendant's Exhibit No. 32 and state what that is, if you know?

(Testimony of Fred Geschwill.)

A. Well, it is exactly the argument or the talk we had this [97] morning about when I asked him, Mr. Fry, about these hops; then he made me sign this statement here because he said it would be more convenient for him if they were weighed; all he has to do is to write the weight down and I get my money, by doing it this way, and I said, "If that is your way of doing it, it is all right with me."

Q. Is that your signature on that document?

A. Yes.

Q. That is the so-called letter that was referred to this morning as having been signed by you prior to the weighing of the hops, the cluster hops, is that right? A. Yes.

Mr. Kester: What is the date of that?

Mr. Kerr: October 10th.

Mr. Kester: October 10th?

Mr. Kerr: Yes.

A. The "10" has been written in there; the other is typed. I think it was around that time when they received them.

Q. You helped with the weighing-in of those hops, did you not? You assisted in that?

A. Yes.

Q. Did you see the samples that were taken from your hops? Were you there when the tryings were taken?

A. I think I was. That was on the 10th you are speaking about, the 10th of October? Yes, I seen all the hops. [98]

(Testimony of Fred Geschwill.)

Q. You saw the samples, all the tenth-bale samples that were taken at that time? A. Yes.

Q. Do you recall whether or not those samples were uniform?

A. I would say they was uniform.

Q. Do you recall any conversation had with Mr. Fry or anyone else concerning the taking of second samples?

A. No, no more than we talked about some bales and saying there might be some bales that was a little heavier bales, but we couldn't find any difference at all.

Q. Whom do you mean by "we"?

A. Well, Fry and I.

Q. Isn't it a fact Mr. Fry found three bales, the samples of which showed up better than the samples of the other bales, and that he turned these bales over to you then?

A. Not that day. It must have been some samples taken before that day because he took fourteen samples, and when we talked about those samples that was up in the office. I believe Mr. Paulus was along with us at that time.

Q. Will you relate the conversation about those samples at that time and state when it was?

A. That statement he made—He had looked at Bale No. 90 and so on—He had three or four samples at that time and he said, "They are much better hops than samples like on Bale 10 or 20 or 30." I

(Testimony of Fred Geschwill.)

can't recall just exactly, but something like that [99] happened.

Q. Was any reference made at that time about false packing?

A. No. I never heard that before, "false pack."

Q. Was any reference made to more than one sample having been taken from any particular bale?

A. No, the only time I was present was when the fourteen samples was taken, but they usually do take some samples, because I got a letter here that they took more samples one time.

Q. Those previous samples were the so-called type samples?

A. I don't recall, but they took samples as soon as the hops was in the warehouse. They might have taken samples ten times. He had the right to take all the samples they want.

Q. You stated you took two or three samples from your late cluster hops. When did you take those samples?

A. I took some samples—I don't know exactly, now, but I believe I took some samples when Paulus was there and Paulus showed me these samples. I believe he let me have two or three samples.

Q. The two or three you referred to this morning are those you got from Mr. Paulus?

A. I asked him if I could have some of these samples and he said, "Oh, yes," but I didn't took some samples in the warehouse. The field man for

(Testimony of Fred Geschwill.)

Hart's office took some samples and brought them up to Harry Hart's office here.

Q. When was that? [100]

A. I think those samples come in after those was rejected on the 15th of November, 14th or 15th of November.

Q. Are those two or three samples the ones you referred to this morning as having been taken by you? A. No. That was big samples.

Q. Those were additional samples that Harry Hart of Williams & Hart got? A. Yes.

Q. Those two or three samples you got from Mr. Paulus, will you explain the occasion for getting those from Mr. Paulus?

A. Those three split samples—I explained before about them. I am sure I brought them in the Mt. Angel office, the office for the hop co-op, the hop co-op office there, and I laid them up on this shelf there, to keep them for a keepsake, and told them about it. Whether they were going to reject them or whether they had already rejected them, I wanted to keep them there. I also looked at other samples. Some of these fellows had their hops sold and I couldn't figure out why they didn't take my hops.

Q. When did you take these two or three samples from Mr. Paulus?

A. I don't know the exact date, but it was before they was rejected.

Q. Why did you take them?

A. It is nice to have a good hop in your hands and show them to other fellows.

(Testimony of Fred Geschwill.)

Q. Did you take these for the purpose of attempting to sell these [101] hops to someone else?

A. Not then, because I couldn't sell them. I still had hopes they was going to take them hops.

Q. What did you do with these two or three samples?

A. Like I said before, showed them to two or three other fellows because they was split samples and I couldn't go out and try to sell these hops on split samples; if I wanted to take samples of the hops in the warehouse, I could have taken them and take a sample like that probably to represent my lot, to other buyers, to other brokers, or to the brewery, for instance. Maybe I took some samples of them along to the brewery. It is all the same hops.

Q. When did you first offer your cluster hops to Williams & Hart after they had been contracted for by Hugo V. Loewi?

A. After they was rejected.

Q. That was sometime after October 30, 1947?

A. Yes.

Q. Do you recall how soon after that it was?

A. Like I said before, I believe I had to bring some samples in—I believe it was on the 14th of November.

Q. When did you offer them to Mr. Seavey?

A. It might have been during the same period there.

Q. Around the 14th of November?

(Testimony of Fred Geschwill.)

A. I wouldn't say it was that same day, because one of his men went out *and samples* off my lot. I didn't have enough samples [102] to show them to Mr. Seavey; otherwise I might have.

Q. Then you did not show any samples of these hops to Mr. Seavey, is that right?

A. After they was rejected?

Q. This time you say around the middle of November when you say you offered the hops to Mr. Seavey?

A. I can't recall exactly. It has been so long now, but I either showed him some samples or he got some samples. I believe he went out and got some samples.

Q. From the warehouse?

A. Yes, with my okeh.

Q. How about Williams & Hart?

A. The same thing. He got several samples——

Q. Was it Mr. Harry Hart you contacted for Williams & Hart?

A. Mr. Harry Hart, I talked to him first. That is the only man I knew at that time.

Q. Did you discuss the offer of your late clusters to Williams & Hart with anyone other than Harry Hart?

A. I don't think so. I might have talked to the field man, but most of the discussion was with Mr. Hart himself, and I felt cheap to go in there after he wanted my hops to start out with and then later on I had them yet, and I told him I hadn't sold

(Testimony of Fred Geschwill.)

them, that they was rejected, and he made the statement, he said, "Fred, if I saw these hops you wouldn't have them any more because I could have used them hops." [103]

Q. Mr. Hart is now dead, isn't he?

A. That is right.

Q. When was it you offered these hops to Lucky Lager?

A. Oh, I believe it was pretty well in the spring. I can't recall the exact date. It could be February or March.

Q. February or March, 1948?

A. That was in 1948.

Q. How did you happen to offer them to Lucky Lager?

A. I figured they might buy them; if they wasn't filled up, they might buy them.

Q. Did you submit samples to Lucky Lager?

A. Oh, yes. I had two or three samples there.

Q. Did you specify any price you wanted for them?

A. Oh, yes, I believe we talked about price because the market went down so bad a fellow couldn't keep up any more with what really the price was. It was all guesswork. One day it was 50 and in the morning or evening it went down to pretty near 40.

Q. That was at what time, Mr. Geschwill?

A. Oh, I couldn't recall the date. In the fall there was a few deals made, scattered, I believe. I couldn't recall the exact time. It was sometime in March or April, I would say.

(Testimony of Fred Geschwill.)

Q. Do you recall what the price was for these hops when you offered them to Lucky Lager?

A. I heard some statement made there was some hops sold for 45. I believe I offered them for 55 cents, and he said, "That is [104] cheaper hops than we paid for."

Q. When did you make your trip to Washington?

A. It was the same time when we stopped at the Lucky Lager. We went all the way up to Washington.

Q. Sometime in February or March, 1948?

A. I think it was. I couldn't recall the date.

Q. Did you show any samples to Mr. Lesch (?)?

A. Yes.

Q. What price were you asking for them?

A. I wasn't asking no price at all. I just wanted the market, whatever it was, and I asked him how his hops was selling now and he said, "Well, hops pretty well sold out last fall," and he was getting 45 cents, grower's market. That means 10 cents difference. It would have been about 35 cents; dealer's market, 45 cents—It means about 10 cents difference a pound to the dealer; sometimes it means 20. They have their own price then.

Q. You don't know what margin the dealer had?

A. Mr. Lesch said 45 cents he was getting from dealers.

Q. That was the price to brewers?

A. I don't know how it was; might have run down along there. I didn't look into that.

(Testimony of Fred Geschwill.)

Q. You don't know what he meant by 45?

A. He meant that would be the dealer's price; that is what he could sell them for, because the Co-op got more money than the farmer would. If I joined the Co-op I got a nickel or so more [105] because their overhead—They don't want too much profit.

Q. You are not a member of the Co-op?

A. No.

Q. And you were not in 1947?

A. No. If I would have been, I couldn't sell them to nobody else.

Q. You said on April 1st 35 or 37½ cents a pound was the grower's market price for hops, as I understood you. What kind of hops were you referring to, fuggles or clusters?

A. Any hops. I asked, "Does it matter?" And he said, "No, because it is getting too close to another season." He was a responsible person and I could take his word for it because he represented twenty-five to forty percent of the growers in Washington, and any man of his following had to be trusted, naturally.

Q. Was that the going market price for such hops as were then available? A. Yes.

Q. Irrespective of quality, grade or condition?

A. Oh, well, they naturally had to be around eight percent at that stage.

Q. Those prices were for 1947 crop of hops?

A. That was for 1947 hops, yes.

(Testimony of Fred Geschwill.)

Q. You stated your 1947 crop of cluster hops was not affected by mold. What do you mean by "Not affected by mold"? [106]

A. Mold, like I said before, is caused by lice. Where there is a lot of lice in your hops, many live in your lupulin; the old ones die and young ones come on and they multiply; they are right in the hop and they make a black hop. That is what I call mold.

Q. Is that the only type or condition——

A. That is all I ever heard, was mold.

Q. Did you ever hear of blue mold?

A. Blue mold could come from lice, where the hop gets black. That is my experience in it.

Q. Do you know whether or not blue mold could be developed from other than lice?

A. No, I couldn't answer that.

Q. You are not informed about blue mold, then?

A. No, I couldn't make any statement on that at all. I know nothing about blue mold. They always call it mold. I figured it would always get black and the hops would look black.

Q. You said these hops were in sound condition? A. Yes.

Q. What do you mean by "sound condition"?

A. They was properly picked; they was properly cured and properly baled and proper everything else.

Q. Would you say the crop was affected by mildew?

(Testimony of Fred Geschwill.)

A. 1947 was in sound condition. 1947, like I mentioned before, we had a touch of mildew in it. Some had more and some had less [107] but I was one of the ones that didn't have too much. I took care of it. I figured I had a good, choice hop, a fine hop for 1947.

Q. Explain what you mean by a good, choice, prime hop for 1947? You mean in comparison with other 1947 clusters? A. Yes.

Q. You mean to say they were equal to the best?

A. No, the best is choice. I don't deny that I haven't got no choice hops.

Q. Have you ever contracted to sell choice hops any time?

A. The only contract I had, as I mentioned before, I had with Harry Hart, and he took every hop I raised, up to the stage Mr. Paulus come in and wanted to buy my hops in 1947. The contract was exactly like it was there. They had to be a good hop.

Q. Had to be a prime quality hop?

A. Yes.

Q. Do you know of any contract any grower has ever executed with any dealer which specified choice hops?

A. One man, Mr. Lesch (?), made the remark he had choice hops, and he picked them one by one, but it cost him so much he couldn't afford it. It is impossible to produce a choice hop.

Q. What I am asking you is whether or not you

(Testimony of Fred Geschwill.)

know of any instance where a grower has contracted with a dealer to sell and deliver to the dealer choice hops? A. No, I don't. [108]

Q. As a matter of fact, grower-dealer contracts are for prime-quality hops?

A. Prime, not choice.

Q. Prime, not choice? A. Prime.

Q. Let's go back to what you mean by prime quality hops for 1947. I believe you said you do not mean that they are equal to the best hops produced in 1947. You don't mean that, is that right?

A. No, that is right, because if I had the best, I had choice hops.

Q. Do you distinguish between prime and choice hops as far as contracting with a dealer is concerned?

A. No, I couldn't sign a contract for choice hops; couldn't produce—couldn't get enough. I would have to go out and pick them pretty near one by one. It would cost too much to do that. I don't think a brewery wants choice hops like that. They couldn't afford to buy them.

Q. Do you mean your 1947 late clusters were equal to the average late clusters produced in 1947?

A. In the State of Oregon, yes.

Q. In the entire State of Oregon? A. Yes.

Q. Equal to the average?

A. Yes. For 1947? Yes. [109]

Q. Why do you say that in your opinion they were equal to the average?

(Testimony of Fred Geschwill.)

A. Because I was out and seen different yards, several yards, and some farmers, some hop growers, come to my yard and looked at my yard while the hops was growing.

Q. That was while the hops were growing?

A. Yes, during picking time. They seen my hops at picking time. Maybe some of them seen them when they was in the hill.

Q. Actually, you saw very few hops in the valley, 1947 crop of hops in the valley?

A. I seen some samples sometimes.

Q. How many?

A. I believe I was in the Co-op office once and they had several samples laying there.

Q. Any others that you saw?

A. I saw some where they received some hops. Mr. Hart received some.

Q. You saw them? A. Yes.

Q. It is on the basis of those samples of Oregon 1947 late cluster hops that you say your 1947 late cluster hops were equal to the average Oregon production in 1947, is that right?

A. Yes, I say that.

Q. You said your 1947 crop of clusters were of prime quality. There again did you mean prime quality for 1947 in Oregon? [110]

A. In 1947, yes.

Q. And for Oregon, is that right? A. Yes.

Q. Not for the Willamette Valley but for Oregon?

(Testimony of Fred Geschwill.)

A. For the Willamette Valley, around here. That is the only hops—There is a few raised down south, but when we say "Oregon" that is the Willamette Valley, Independence and around there.

Q. Let me get this clear: When you say they were prime quality for Oregon in 1947, you really mean prime quality for the Willamette Valley, is that right?

A. That is for the average grower of hops because what we call the Willamette Valley is pretty well all-inclusive, covers pretty well the hop crop.

Q. You don't include Grants Pass?

A. Very few there.

Q. Would you include them or not?

A. Yes, I think some are there.

Q. How about Ontario?

A. Well, that is Idaho?

Q. Over in Eastern Oregon.

A. I didn't see those hops in Ontario. Couldn't go 800 miles and look at their yards. I figured my valley, hops of the valley farmers.

Q. That is your idea of prime quality?

A. Yes, that is right. [111]

Q. Equal to the average produced during that year in the Willamette Valley?

A. That is right.

Q. Comparing the 1947 lot of cluster hops with your late cluster crop in 1946, would those hops have been prime quality in 1946, in the Willamette Valley?

(Testimony of Fred Geschwill.)

A. I think it was. Might not have so much——

The Court: We will take a short recess.

(Recess.)

Q. (By Mr. Kerr): Complete your answer now.

A. You are asking in 1946 if they was as good quality as prime hops in '47?

Q. Yes.

A. In one way they was and then again they wasn't. We was bothered pretty much with blight in 1946 before really we got a chance to pick them. We had to leave a lot of hops in the field. We was short of help and couldn't pick them and that is why I switched over to machine-picking.

Q. Were these blighted 1946 hops prime quality hops?

A. Yes, my contract was the same as 1947.

Q. In other words, in your opinion, if the average production of cluster hops in the Willamette Valley in 1946 was lice-infested, or a black type of hop, that would still be prime quality?

A. No, I won't say that, but they took them because it was under contract; they was under OPA. [112]

Q. They wouldn't be prime quality?

The Court: What is that about OPA?

A. OPA made a ruling about our hop market. They set the price.

The Court: They took bum hops, did they?

The Witness: Yes, they took bum hops; they

(Testimony of Fred Geschwill.)

took rotten hops. There was even a black market for them. They tried to get them over the OPA. They bought hops and paid a premium.

Q. (By Mr. Kerr): Were those hops you described as 1946 hops prime quality hops in your opinion? A. Well, ——

Mr. Kester: Are you talking about his hops or talking about 1946 hops generally?

Mr. Kerr: Let's read the preceding question.

The Court: You had better ask another.

Q. (By Mr. Kerr): Mr. Geschwill, if the average of the cluster hops produced in the Willamette Valley in 1946 was lice-infested, a black type of hop, would that hop be prime quality, as you understand that term?

A. Again in 1946 I believe was called prime quality because that is what they raised and that is what they took and they was satisfied with those hops.

Q. Because that was the average of the production of the Willamette Valley, you call them prime quality hops?

A. Some of them had pickers that got them off the vines quicker than others, but as far as rejecting any hops at all, that was [113] out in the whole Willamette Valley except some of them that didn't want to sell.

Q. How do you define a prime hop?

A. Like I made the statement before, it has a lot to do with the season, and we always call it an

(Testimony of Fred Geschwill.)

average hop or a prime quality hop in our valley.

Q. That is your only description of it?

A. That is about the only description what we got. As far as a prime hop is concerned, if you went out to our yard I could bring you a choice hop. If you don't want them—If it is too much money, you kick about it, and you throw them aside. You don't want them. You find some excuse. Some of them want a green hop; the other one wants a yellow. The other ones—I don't know.

Q. You said your hops in 1947, your late clusters, were of good color. What do you mean by "good color"?

A. In 1947, if the 1947 was nice color? Yes.

Q. There, again, you apply comparative standards with other hops in 1947? A. 1947, yes.

Q. What was the color of these hops you produced in 1947, the late clusters?

A. My hops was a kind of a golden-yellow hop.

Q. Any brown in them at all?

A. Like I made the statement before, I had a few of these [114] nubbins in them, a few.

Q. Those nubbins were not golden-yellow, were they?

A. No, they was a little more of the brown. Anybody can see that in a hop.

Q. You consider that a good color?

A. For that year, yes. Oh, yes.

Q. You said your 1947 crop of cluster hops was fully matured. What do you mean by "fully matured"?

(Testimony of Fred Geschwill.)

A. Well, some of them start in blooming a week before others and when the average is just about right, that is what we call fully matured.

Q. Were those nubbins you said were in your 1947 crop of cluster hops fully matured hops?

A. Some nubbins; it turned out there were some good hops—Some of them just dried up, like I mentioned before.

Q. Then, would you say the nubbins were or were not fully matured hops?

A. A nubbin is not a matured hop, no.

Q. What do you mean by "cleanly picked"?

A. Cleanly picked, like I mentioned a minute ago, OPA, they made a regulation of eight percent; that was our standard. They picked hops as high as sixteen percent leaf and stem.

Q. OPA was not in effect in 1947.

A. The buyers started at eight percent and called it a standard hop, a prime hop; then, if they was nine percent picked, they got [115] them lower, ten, twelve, up to sixteen.

Q. I understand all that, Mr. Geschwill. What do you understand by a cleanly picked hop?

A. A cleanly picked hop; an eight-percent hop is a cleanly picked hop, yes.

Q. With reference to vermin, damage by vermin, I believe you said you considered vermin referred to lice? A. Yes.

Q. Is that right? A. Yes.

Q. How about rats?

(Testimony of Fred Geschwill.)

A. Well, of course, in this year's pick there was surplus hops the farmers couldn't sell; farmers couldn't sell their hops and they stored them and five months afterwards the buyers came and saw the hops. Them farmers had them stored up somewhere, in any kind of a building, and naturally the rats and mice moved in. Lots paid a premium for those hops, paid a good price for them.

Q. So "vermin" refers also to damage by mice?

A. Not exactly; not in 1947 crop or in the 1946 crop. That is out.

Q. So, whether or not a particular lot of hops was damaged by vermin depends on whether or not the average of the crop in the Willamette Valley for that year was damaged by vermin?

A. Yes, some years, yes.

Q. In any year? [116]

A. Pretty near any year, yes.

Q. You said in your opinion your 1947 late cluster hops were in good order and condition. You refer to these hops as of what time?

A. At the time they was in the bale and in the warehouse.

Q. If these hops had been substantially affected by downy mildew, would you say they were in good order and condition?

A. I didn't get the question.

Q. What if you had a lot of downy mildew damage in your hops, would you say then they were in good order and condition?

(Testimony of Fred Geschwill.)

A. If I saw a lot of downy mildew, my conscience would bother me, and I would call up Mr. Paulus and say, "Come on out and look at the yard."

Q. Let us say if they are in bales.

A. I wouldn't have went that far because I know before they get in the bales what the hops are in the yard.

Q. You would not consider hops which were badly affected by downy mildew to be in good order and condition, would you?

A. If they come up to a percentage where they would be—I wouldn't know, I am quite sure, much about it. It would be done on Paulus' recommendation or any of his men, to tell me what to do.

Q. You said a five-percent downy mildew infestation was what you had in 1947. What if you had 50 percent?

A. Then I would have called Mr. Paulus up and said, "Come on out [117] and look at my hops."

Q. I mean, if they are in the bale?

A. Well, they never would have got in the bale.

Q. Let us assume that they did get into the bale. Would you have considered them to be in good condition and order?

A. 50 percent? No, I would not.

Q. 25 percent?

A. 25 percent? Getting down to a hop where it could be desirable. You would kind of pay more attention to it than a 50-percent hop, naturally.

(Testimony of Fred Geschwill.)

Q. But it still might not be in good order and condition? A. Maybe not.

Q. Your definition which refers to "good order and condition" applies to downy mildew damage?

A. To some extent, like I say. It all depends on how bad the damage is.

Q. Do you recall when the late cluster hops were weighed in? A. About the 12th, in October.

Q. That was after you signed the statement dated October 10th?

A. After, yes. He talked me into signing it because he said, "It is more convenient" to them, if they had them all weighed, to make a settlement.

Q. As a matter of fact, he told you then, did he not, that Mr. Oppenheim did not like the quality?

A. He didn't say a word in the warehouse to me. [118]

Q. At any time prior to October 10th?

A. Mr. Paulus in the office maybe made that statement that he—He never did come right out and say what he wanted until the last day. He told me that is what Mr. Oppenheim said, the statement he made, that he didn't like them samples, like I mentioned before, 10 or 20. I figured, well, if there is that much variation, I would agree to compromise somehow, but Mr. Paulus it seems made the remark, "It can't be done. They are all alike, the whole lot of fourteen samples."

Q. Isn't it a fact that sometime prior to the time you signed this letter of October 10th, Defend-

(Testimony of Fred Geschwill.)

ant's Exhibit No. 32, you were told by Mr. Paulus that Mr. Oppenheim did not like the quality of your 1947 clusters and that, therefore, he would require Mr. Paulus to get tenth-bale samples?

A. That is in a written statement—I believe there is a letter here someplace.

Q. That was prior to October 10th?

A. No, it was before that.

Q. It was before October 10th?

A. Yes.

Q. Have you ever sold hops on the spot market; that is, other than by contract?

A. Never sold no hops on the spot market; always had them under contract with Mr. Hart until Paulus——

Q. Then, these hops you sold to Williams & Hart, after they had [119] been rejected by Lucky Lager, were the first hops you ever sold on a spot sale? A. That is right.

Q. These sales to Williams & Hart were made on the basis of samples? A. Yes.

Q. Was there any downy mildew in your 1946 cluster hops? A. In our 1947 cluster hops?

Q. 1946?

A. I can't recall it exactly, two or three years back; I wouldn't know. It could have been, yes. There always was; we have been finding mildew all the time.

Q. But, as a matter of fact, you had a heavier infestation of downy mildew in 1947?

(Testimony of Fred Geschwill.)

A. We had slightly more, but not as bad in lice.

Q. Worse in downy mildew than in any previous year you have grown hops?

A. No, I wouldn't say that. We had a touch of mildew in 1944 that was real bad. We had to tear them down and plant new vines.

Q. That occurred before picking time, didn't it?

A. Yes.

Q. As of the time for picking hops, isn't it a fact that your 1947 crop was more affected by downy mildew than any previous crop you had?

A. As of the time of picking, I believe it was, to some extent. [120]

Q. And that was general throughout, in the Willamette Valley? A. Yes.

Q. Isn't it a fact, Mr. Geschwill, that you offered to sell to Mr. Paulus your 1947 cluster hops at a price lower than the contract price?

A. After they was rejected, yes.

Q. Yes. Will you describe when this took place and what occurred?

A. I couldn't recall. I believe Mr. Paulus knows more about it because he corresponded, I imagine, ——

Q. After your 1947 clusters had been rejected, you then offered to sell them for five cents under the contract price? A. I imagine five.

Q. Perhaps some even more under what the contract called for?

(Testimony of Fred Geschwill.)

A. Yes, because I wanted to get rid of them hops. I couldn't eat them.

Q. Do you recall how soon after the rejection that was?

A. No, but I went in quite often because I worried about that now that I got turned down the last minute and after I found out the different dealers was filled up; I surely worried about it. I must have went in several times.

Q. The first time you went in after the rejection letter was only a few days after the rejection letter, wasn't it? A. It could have been, yes.

Q. Do you recall when you received the advances from Hugo V. [121] Loewi, Inc., under the cluster contract?

A. They was made the first day they handed me the contract; that was on the fuggles.

Q. I am referring to clusters.

A. Then, right after, oh, I would say about two weeks afterwards before we started in on the lates—the 27th or 28th of August, I would say I got the check.

Q. That check was mailed to you, was it not?

A. It could have been, yes. I believe it was.

Q. Do you recall whether or not you received it by mail?

A. I wouldn't know exactly, but in any event it would have been all the same. I believe it was mailed to me, as much as I remember.

(Testimony of Fred Geschwill.)

Q. That was without any request on your part for advances?

A. Well, maybe we talked about it, as soon as we started in picking, but that is so long back I wouldn't know, but when he sent me that money I don't know if Mr. Paulus called me and told me about it—If I needed money, I would let him know.

Q. Do you remember when that was?

A. That must have been around the 27th or 28th.

Q. Was that before or after you got the $4,000?

A. Yes. I don't know. There was some kind of a statement made.

Q. You do not recall whether it was before or after you got the $4,000?

A. It must have been after, because—— [122]

Q. You testified, Mr. Geschwill, you offered your late cluster hops to Williams & Hart about November 15th; then, thereafter, sometime in February or March, 1948, you offered them to the Lucky Lager and to Mr. Lesch (?).

A. No, I didn't offer them to Mr. Lesch. I just went in to Washington to find out more or less the market, because he had lots of hops on hand himself, too.

Q. Did you offer them to anyone other than Williams & Hart or Lucky Lager?

A. Mr. Seavey, I believe, or to—Mr. Seavey, I believe, had some samples.

(Testimony of Fred Geschwill.)

Q. That was what date that you offered them to Mr. Seavey? A. I can't recall the date.

Q. Was that about November 15th?

A. I just can't recall dates at all.

Q. Did you offer them to anyone else?

A. No. The Co-op—Yes, some of them asked me about them and, as a matter of fact, they all knew that I had them hops but wasn't too much interested because they was rejected.

Q. And because they were of low quality?

A. No, not a poor quality. They was rejected by Mr. Paulus, and when a hop is rejected the other dealers won't handle them because they are more or less all friends together, and they don't want to have no bad feelings about it.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. Counsel asked you what you meant by "prime quality hops." I will ask you what is the meaning of the term "prime quality hops" in the hop business, generally?

A. It is a prime quality hop in general in that year, whatever was raised. I call a prime quality an average hop.

Q. An average hop for the season in which it is grown? A. Yes.

Q. A "prime quality" or the term "prime quality" as *it used* between growers and dealers and in the hop business? A. Yes, in that year.

(Testimony of Fred Geschwill.)

Q. I do not want to lead you into it, but what is the trade meaning of the term "prime quality" in the hop business?

A. I can't just get that, how you mean it; but the meaning is that is an average hop. That is what we call "prime."

Q. A prime hop is an average hop for the season? A. For the season, yes.

Q. How did your hops compare in quality with the average for the 1947 season? A. Good.

Q. Referring to the cluster hops?

A. Yes, good.

Q. Counsel asked you whether or not representatives of Hugo V. Loewi, Inc., ever went into your yard to look at the hops. Was [124] your yard available for their inspection at any time?

A. Yes, any time. I couldn't hold them out of my yard at all. They have a perfect right to go through the yard and, if something is wrong, if I didn't dust, they would naturally complain. It also says in the contract if they are not cultivated that they could refuse to make payment or cancel my contract.

Q. Is it customary in the hop business for field men of the buyers to go out and look at the yard?

A. Oh, yes, from the growing stage, from the first day when we go in the yard to the last day.

Q. Are hops of a perishable nature after they have been picked and dried and baled? Do they stay in the same condition, or what happens?

(Testimony of Fred Geschwill.)

A. No. They deteriorate quite a bit if they are out in an open building or in a sample room where they got them in the sun; but if they would have them under an even temperature—I don't know what; probably about 34, maybe, in a cool place, they hold quite long.

Q. About how long do they hold before they start to deteriorate rapidly after they have been baled?

A. If I lay my hops in a storeroom, after the winter is over, in the spring of the year—I would say from May on—when the weather gets warm, it is bad on the hops because they deteriorate bad. That is why we try to take care of hops from one year to another. The brewers, they all have their own storerooms more or [125] less. It is getting now, of course, that the Co-ops, they like to build their own storerooms, too.

Q. You mentioned sunlight. What does sunlight do to the hops?

A. It will discolor them. It will bleach them, or whatever you call it.

Q. If they are wrapped in paper, say, ——

A. Even if they are wrapped in paper, except they have some kind of a special paper made and they are wrapped several times; it won't be as bad as on a single wrapping, like we got them here. I believe they are all in a single wrapping.

Q. What about moisture—Does that affect them after they have been baled? Do they dry up or pick up moisture?

(Testimony of Fred Geschwill.)

A. If they are dry, they will gain over the winter, during the winter.

Q. Gain during the winter?

A. Yes. On 200 pounds I imagine the bales gain one, two or three pounds.

Q. How about in the summer?

A. They lose their weight again, then.

Q. How about the aroma or flavor of the hop? Does that change over a period of time? Say a year and a half after they were baled, will the samples have the same aroma that they had when they were first baled?

A. No. That is completely out. That cannot be.

Q. Can you take samples a year and a half old and say that these [126] samples still look and feel and smell like the original crop or at the time they were baled?

A. They cannot; they deteriorate. That can't be done. They won't be the same.

Q. One more question: In the drying process, when green hops are dried, what is the loss in weight there? Is there a ratio of so many pounds of green hops——

A. Oh, yes. If you have, say, four pounds of green hops, you have one pound of dried hops; about one-to-four.

Q. About four-to-one? A. Yes.

Q. When paying for picking, do you pay on the green weight?

A. On the green weight, yes.

(Testimony of Fred Geschwill.)

Q. What did you pay in 1947 for the cost of picking?

A. The cost of picking was—just the picking itself was four cents on the green weight.

Q. That would be about sixteen cents a pound dry weight? A. Yes.

Q. Do you remember what the cost was for drying and baling?

A. That was around—oh, around three and a half cents is the going rate.

Q. Do you remember what you paid to the College in 1947? A. I don't recall exactly.

Q. Would that cover both drying and baling?

A. No, not drying and baling. [127]

Q. Was that just for drying?

A. That was just for picking; picking, four cents.

Q. How about drying and baling? Is there a separate charge for that?

A. Oh, yes, and burlap is quite high.

Q. How much did that run per pound in 1947?

A. Like I say, averaged around four—three and a half cents a pound. That was just drying, and then some of them charge $2.00 a bale for baling, and then the burlap is—twelve or fourteen pounds of burlap comes around—40 cents a pound or so.

Mr. Kester: I think that is all.

(Testimony of Fred Geschwill.)

Recross-Examination

By Mr. Kerr:

Q. Your per-pound cost goes down the more hops you pick and dry and bale, isn't that true?

A. No. You mean by "picking" I get a cheaper rate?

Q. The bigger the crop you have——

A. No.

Q. ——the lower the cost of production per pound would be?

A. You refer to the entire cost?

Q. The entire cost for the season.

A. Oh, yes, the bigger the crop, yes. It costs more money, but the cost is pretty near the same up to picking time on ten bales to an acre or five bales; the cultivation and dusting, that is [128] the same.

Q. With respect to the change of condition of hops as a result of age, after they have been baled, do the effects of mildew damage increase or decrease? A. No. That has nothing to do.

Q. If a hop, when it is in a bale, originally is damaged by mildew, that damage will not increase?

A. That damage won't increase.

Q. That is fixed? A. That is set.

Mr. Kerr: That is all.

(Witness excused.) [129]

JAMES H. FOURNIER

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is Jim Fournier?

A. James H. Fournier, yes.

Q. Where do you live? A. In Mt. Angel.

Q. What is your occupation?

A. I am in the bank there.

Q. What bank is that?

A. United States National.

Q. What is your position in the bank?

A. Manager.

Q. Do you have charge of all banking operations at your bank? A. Yes.

Q. Is there any other bank in Mt. Angel?

A. No, there isn't.

Q. In connection with your work as manager of the bank there, do you have occasion to be in touch with hop growers in that vicinity and to be familiar with what is going on in the hop business in that vicinity? A. Yes, sir.

Q. I will ask you if you recall on about the 10th day of October, [130] 1947, being in Schwab's warehouse at the time when Mr. Geschwill's 1947 cluster hops were being weighed in, at which time Mr. Lamont Fry was present and perhaps one of

(Testimony of James H. Fournier.)

the Schwab brothers? Do you recall that incident?

A. I do, sir.

Q. Did you hear any conversation between Mr. Geschwill and Mr. Fry at that time? A. Yes.

Q. Would you state the conversation that you heard?

A. Mr. Geschwill had met me out in front of the warehouse and asked me to come in the back end and see his hops.

We walked in the back end and as we walked into there Mr. Geschwill hollered to Mr. Fry, "How do they look?" And Mr. Fry replied that "They look like some of the best hops I have sampled this year."

Q. Was any further conversation had at that time between Mr. Geschwill and Mr. Fry?

A. No. I left.

Q. Did you know Mr. Fry previously?

A. Yes.

Q. You knew him personally, did you?

A. Yes.

Q. Did you know his connection with Paulus and Hugo V. Loewi, Inc? A. Yes, sir. [131]

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. Will you state again what statement Mr. Fry made that you heard?

A. Mr. Fry said that "These are some of the best hops that I have sampled this year."

(Testimony of James H. Fournier.)

Q. Do you recall that he used the word "sampled"?

A. "Sampled" or "tested." In the trade it is all the same.

Q. Do you recall which word he used?

A. No, I wouldn't say that I could, but the implication was the same, that they were the best hops that he had seen.

Q. An implication, was it?

A. That is an implication, the implication that I got.

Q. Are you a hop grower?

A. No, sir. I am no hop expert at all.

Q. How do you know that is the implication in the trade?

A. Well, I have heard the expression used by growers or, rather, buyers, around the warehouse in Mt. Angel.

Q. That is the basis for your statement that that is the meaning of the term as used in the trade?

A. I would say so; yes, sir.

Q. Where was Mr. Fry when you heard him make that statement?

A. Mr. Fry was in front of the shipping door on the west side [132] of Schwab's warehouse and had a bale down that he was sampling.

Q. Do you know whose hops he was sampling?

A. No, sir.

Q. Do you know what sample he was talking

(Testimony of James H. Fournier.)

about when he referred to a sample or test that he had made?

A. I didn't know that, but I assumed they were Mr. Geschwill's.

Q. Did you know when he had taken the sample that you assumed he was referring to?

A. I didn't get that question.

(Question read.)

A. He was taking it at the time we walked in.

Q. How do you know that?

A. He was taking the sample out of a bale of hops.

Q. If you did not know whose hops he was then sampling, how did you know if that was the sample he was referring to?

A. Mr. Geschwill asked him how they looked. There was certainly other hops in the warehouse, and he had this particular bale in front of him that he was sampling.

Q. Would you say that it was possible that Mr. Fry was referring to hops that he had seen, other than at the warehouse?

(Question read.)

A. No, sir.

Q. Why wouldn't that be true?

A. He was sampling a bale of hops in front of him and Mr. Geschwill asked him how they looked.

Q. Those were the exact words he used, "How do they look"?

(Testimony of James H. Fournier.)

A. Mr. Geschwill hollered that before we even got to Mr. Fry. Mr. Geschwill hollered, "How do they look"?

Q. This was on what date?

A. I wouldn't say what date. It was the early part of October. I don't know what date it was exactly.

Q. Explain how you happen to remember that particular incident.

A. I remember it very vividly because after Mr. Geschwill's hops had been rejected I wondered why, if they were of good quality, assuming that those were the hops, they were not received.

Q. Do you know whether they were fuggles or clusters Mr. Fry was talking about?

A. No, sir; I don't know that.

Q. You don't know that? A. No.

Q. Does Mr. Geschwill owe your bank any money?

A. Am I supposed to answer that, your Honor?

The Court: Yes.

A. Yes, he does.

Q. (By Mr. Kerr): Do you mind stating how much? A. Right now about $8,000.

Q. How far away was Mr. Fry from you when he made the statement you referred to?

A. About 15 feet; between 10 and 15 feet.

Mr. Kerr: That is all. [134]

(Testimony of James H. Fournier.)

Redirect Examination

By Mr. Kester:

Q. One or two things I want to ask you about. In your business as manager of the bank there did you have occasion to go over to Schwab's warehouse more or less frequently?

A. Yes. As a matter of fact, the warehouse is located directly across the street from the bank.

Q. About how often during the hop season would you say you would go over to the warehouse?

A. I would go over there at least once a day.

Q. Is that warehouse sort of the center of hop activities in Mt. Angel? A. Definitely.

Q. At the time you went over there were you aware of the fact that the Geschwill hops were being weighed in by Loewi at that time? A. No.

Q. What was the occasion of Mr. Geschwill asking you to come in and look at his hops, do you recall? A. I don't know.

Mr. Kester: I think that is all.

Recross Examination

By Mr. Kerr:

Q. Did Mr. Geschwill ask you to go in and get his hops at that time? [135]

A. Yes, he said, "Come back and look at my hops. They are being sampled."

Q. That is the reason you were there at that time?

A. No, I go over there every day. Mr. Gesch-

(Testimony of James H. Fournier.)

will just happened to be there. It might have been any other grower that could have asked me the same question.

Q. You didn't go over there with Mr. Geschwill, then? A. No, sir.

Mr. Kerr: That is all.

Q. (By Mr. Kester): You were subpoenaed to come here, weren't you? A. Yes.

(Witness excused.)

JOSEPH FAULHABER

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. State your name, please.

A. Joseph Faulhaber.

Q. Where do you live, Mr. Faulhaber?

A. Mt. Angel.

Q. What is your business?

A. Chief of Police.

Q. Have you been in the hop business?

A. Yes, I have been in the hop business years ago when I was on a farm.

Q. Have you been in touch with the hop business quite a bit?

A. Oh, for about thirty years I have been working in hops and raising hops.

(Testimony of Joseph Faulhaber.)

Q. Have you had occasion to be familiar with the process of growing and picking and baling, and so on? A. Yes.

Q. Everything connected with hops?

A. Yes.

Q. How long has it been since you had a hop ranch? A. I think it was 1933 when I quit.

Q. Over how many years did you have your own hop ranch? [137] A. About five or six years.

Q. Prior to that time had you worked in other people's hops? A. Yes.

Q. Have you had experience in looking at hops and telling whether they are good or bad or what the quality is?

A. Oh, yes, sure. I raised hops. You raise hops once and you can tell the difference.

Q. I will ask you if you recall an occasion on about the 29th of October, 1947, in the office of C. W. Paulus in Salem, when you accompanied Mr. Geschwill into Mr. Paulus' office and, with Mr. Paulus, went into the sample room to look at some samples? Do you recall that occasion? A. Yes.

Q. Do you recall what conversation occurred at that time between Mr. Geschwill and Mr. Paulus?

A. Well, they looked at the samples and Mr. Paulus says—there was three of the samples out of, I think, thirteen altogether—that three of them—that he would take them if they was like them three. But Paulus, he says, he couldn't tell no difference between them. I think there was probably seventy,

(Testimony of Joseph Faulhaber.)

and there was three of them that they had marked that they would take.

Q. When Mr. Paulus said he would take the ones that matched those three, did he tell you where he got those instructions or whose idea it was?

A. Yes, he got it from the fellow he was buying for. [138]

Q. Did he make the statement there that it was on instructions from the buyer? A. Yes.

Q. Did you look at these samples yourself?

A. I did.

Q. Could you tell any difference between all three samples? A. No, I couldn't.

Q. Did they all look about the same?

A. They looked all the same. I couldn't see a bit of difference.

Q. What was your opinion of the quality of those hops?

Mr. Kerr: Just a moment. I object to the question on the ground that this witness is not qualified as an expert to grade hops.

The Court: He may answer.

Q. (By Mr. Kester): What was your opinion as to the quality of those hops at the time?

A. Well, they looked to me like they were prime hops, because they was all nice clean-picked; they looked good.

Mr. Kester: That is all.

(Testimony of Joseph Faulhaber.)

Cross-Examination

By Mr. Kerr:

Q. Have you related the full conversation between Mr. Paulus and Mr. Geschwill on the occasion you refer to?

A. Well, the principal part, yes. [139]

Q. All right. What are the parts, then, that you have not related?

A. Well, they were talking, of course, back and forth. I never paid too much attention to that.

Q. Was any comment made in your hearing that some of the bales of Mr. Geschwill's hops had not been firmly packed? A. No.

Q. The only statement you heard at all was that of Mr. Paulus to the effect that he could not see any difference between the three samples referred to and the rest of the samples, is that right? A. Yes.

Q. Do you know what he was referring to as the rest of the samples?

A. Well, the other ones that was in there.

Q. How many were there there altogether?

A. About thirteen, I think.

Q. Only thirteen samples? A. Yes.

Q. Do you recall any reference to 70?

A. Yes, there was 70 and then there was——

Q. What was the reference to those bales?

A. Well, those were three bales, samples, that they had picked out and he said that they would take them if they would be all like that. [140]

Q. Was Mr. Fry there at the time?

(Testimony of Joseph Faulhaber.)

A. No, he wasn't.

Q. Was anyone there other than you, Mr. Paulus and Mr. Geschwill?

A. Only three of us that looked at the samples.

Q. What time of day was that?

A. I couldn't recall. It must have been around noon, either before or right after dinner.

Q. Why did you happen to be there?

A. Oh, I just happened to go along with them.

Q. With Mr. Geschwill? A. Yes.

Q. Did he ask you to go?

A. He asked me if I wanted to go along and take a ride. He often takes me along, as far as that is concerned, any day when I am not working.

Q. Takes you along where?

A. At different places when he wants to go riding in the car; always takes me along.

Q. On this occasion did he say he was going to Mr. Paulus' office? A. No, he didn't.

Q. He didn't tell you he was going to look at any hop samples?

A. Not when he took me along.

Q. Did he discuss with you the rejection of his hops by Loewi? A. No, he didn't. [141]

Q. Did he make any reference to the quality of the cluster hops at that time? A. No, sir.

Q. You said the samples which you saw on this occasion in Mr. Paulus' office looked like prime hops. Will you describe those samples, please?

A. Well, nice clean-picked.

(Testimony of Joseph Faulhaber.)

Q. What was the color?

A. Kind of golden-yellow color.

Q. Did you notice any brown in the samples?

A. Well, there was a few downy mildew nubbins in it.

Q. Thank you. How many would you say?

A. Oh, we only had half samples and you would see one or two in a layer.

Q. What do you mean by "layer"?

A. Showed up after he broke them in two.

Q. Did you break them in two and look at them?

A. Yes, Mr. Paulus broke them in two.

Q. What do you mean by nubbins?

A. Nubbins?

Q. Nubbins.

A. Well, little ones that didn't mature.

Q. Hop cones that did not mature?

A. Yes.

Q. Those were brown in color? [142]

A. Kind of a brownish color.

Q. Yes. You saw a few of those in the samples?

A. I saw a few of them in there.

Q. You saw some of those in these three samples that you referred to? A. Yes.

Q. You saw some of those? A. I did.

Q. And also in the rest of the thirteen samples?

A. Yes.

Q. Did you examine any other samples of other hops grown in 1947 in Oregon? A. No, I didn't.

(Testimony of Joseph Faulhaber.)

Q. Those were the only samples in 1947 Oregon crops that you saw?

A. No, I seen some, but I didn't examine them; that is, didn't break them apart.

Mr. Kerr: That is all.

Mr. Kester: Thank you.

(Witness excused.) [143]

EDWARD SCHWIND

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is Edward Schwind?

A. Yes, sir.

Q. Where do you live, Mr. Schwind?

A. Vancouver, Washington.

Q. Are you now employed?

A. Not at the present time.

Q. What has been your occupation?

A. For nineteen years, with the Lucky Lager Brewery.

Q. What was your position with the Lucky Lager Brewery? A. Brewmaster.

Q. You were brewmaster with the Lucky Lager Brewery? A. Yes.

Q. Where is that brewery located?

A. Vancouver, Washington.

(Testimony of Edward Schwind.)

Q. What has been your experience and training for work as a brewmaster? Where did you get your training?

A. I started in 1909 as an apprentice in Germany and traveled as a journeyman; went to the brewing school, and in 1923 I left Germany and came to this country. I was employed in a brewery in Pittsburgh and at Milwaukee as assistant brewmaster. In 1928 I left Milwaukee and went to Vancouver, B. C., as brewmaster for the Coast Breweries. In 1933, in April, I came back to the States and since then I have been with the Interstate Brewery or the Lucky Lager Brewery in Vancouver.

Q. In your work as brewmaster, was it part of your duties to purchase hops?

A. Absolutely.

Q. Did you handle the purchase of hops for the Lucky Lager people? A. For nine years, yes.

Q. In so doing did you have occasion to talk to various growers and dealers about hops?

A. Absolutely.

Q. Did you also have occasion to look at samples and decide on the basis of samples whether you would or would not buy hops? A. Absolutely.

Q. Incidentally, do the Lucky Lager people buy mostly directly from growers or through dealers, do you know?

A. For the last ten years we had been buying from the Mt. Angel College and Seavey. Prior to that we had been buying from Livesley, Williams & Hart and——

(Testimony of Edward Schwind.)

Q. They are brokers or dealers in the field of hops? A. Yes.

Q. You dealt with hop dealers to some extent, then? A. Absolutely. [145]

Q. What is the practice in buying hops, from the standpoint of a brewer or from the standpoint of a brewery, rather? Do you buy on the basis of the samples that are submitted?

A. You buy on samples.

Q. Did you have occasion to go out and look at hops in the field?

A. Well, for the last ten years, when dealing with Mr. Angel or Seavey, I went every year out in the field when the crop was ready to be harvested, or a little before that, shortly before that, and during the picking season again and I watched the drying process.

Q. So you are familiar with hops in the field and familiar with picking, as well as in the samples. Do you recall—— A. Pardon me.

Q. Perhaps you did not answer my last question which I asked you. You are familiar with the hops in the field and with picking as well as hops in samples?

A. Well, I would be, having had to buy for twenty years.

Q. Do you remember, Mr. Schwind, an occasion in the early part of 1948 when Mr. Geschwill came to you with some samples of his 1947 cluster crop? Do you remember that incident? A. Yes.

(Testimony of Edward Schwind.)

Q. You remember that incident? A. Yes.

Q. Do you remember the conversation that took place at that time? [146]

A. Yes, sir.

Q. Would you relate what occured at that time?

A. Well, I knew Mr. Geschwill. He had been in the brewery prior to that, but we never talked hop business in those days, because he knew that we were doing our buying through the Mt. Angel College and through Seavey, for the last ten years anyhow, so he came again and brought some samples. I couldn't recall now when it was, the exact date.

I told him then that we are not much interested because business did not come up as expected and we had a carry-over from the year previous and we are not interested.

Q. Did you look at the samples of his 1947 clusters?

A. I looked at the samples. The hops looked like good hop samples, but I still told him "We are not interested." I just said, "I am sorry," because I knew I could make a price if we would be interested in them.

Q. Would you tell us how those samples appeared? How did they look? You say "good hops."

A. The hops appeared as if they were a good hop.

Q. Would you say they were prime quality hops in the hop trade?

A. When we buy from a grower or dealer, I look

(Testimony of Edward Schwind.)

for good hops. He can call them what he wants to, prime, or choice, or standard. I think I should know a good hop from a poor hop.

Q. In your opinion, were these good hops?

A. Was good, average hops. [147]

Q. If you had not already been supplied, were they such a hop that you could have and would have used in your brewery?

A. If we would have needed them, if the business demanded it, yes.

Mr. Kester: Take the witness.

Cross-Examination

By Mr. Kerr:

Q. What date was it you talked to Mr. Geschwill about hop samples?

A. It coud have been in March or April. It was a very nice, warm day and in the forenoon, and I just told him then that he is too late, as things are now, that I go out in the field when they are picked and I want to get them in the brewery and in storage as fast as possible and not leave them any place laying around, that he is too late.

Q. Did Mr. Geschwill tell you whether or not these hops of which you had a sample had been kept in cold storage?

A. He told me the hops was rejected.

Q. Did he say anything about where they were at the time? A. No.

(Testimony of Edward Schwind.)

Q. Did he say anything as to whether or not they were in cold storage?

A. Well, as far as I know, there is no cold storage in Mt. Angel. I knew the hops must be either in Schwab's warehouse or on the [148] farm, which certainly is no good.

Q. In other words, hops which are kept in cold storage for that period of time would deteriorate rapidly? A. Deteriorate pretty rapidly.

Q. Did he quote any price to you?

A. I don't get it.

Q. Did Mr. Geschwill quote any price to you on these hops?

A. No, he didn't, because I would have set the price, because I knew he was anxious to get rid of them.

Q. There was no conversation between you about price? A. No.

Q. Did you notice any blight in the samples that you saw? A. No.

Q. Did you notice any brown nubbins or small immature cones in these samples?

A. The hops was an average sample.

Q. What do you mean by "an average sample"?

A. Well, the aroma, their appearance, not overheated in drying. A hop maybe has been picked and put into the sack before it has been dried.

Q. Were they all fully matured?

A. I wouldn't pay any attention to that.

(Testimony of Edward Schwind.)

Q. Did you notice any small brown partly formed cones or burrs in the samples?

A. I said the hops looked all right to me. [149]

Q. How closely did you examine the sample?

A. When I opened up the sample, I didn't want to have it fall apart and fall all over. I took some of the sample and rubbed it and smelled it and saw that is what I wanted.

Q. Did you break it open? A. Absolutely.

Q. Did you look on the face of the two parts?

A. As a rule, I break my sample in two, and then take some and rub it in the hands and rub it together and warm it and smell it to see what the aroma is, and then before buying we always send samples in for a laboratory test.

Q. You first make this visual examination, do you? You just look at it visually and then you examine the smell, before you send it in to the laboratory for a laboratory examination?

A. Yes. Absolutely no use to send a sample in when you are not interested.

Q. What type of hops do you find to be unsatisfactory from your point of view on your visual examination?

A. The picking—too many leaves, too many stems, too many spots; the color may be what you call windblown or rusty; and then the aroma, first of all.

Q. The aroma is the most important factor, is it?

A. Yes.

(Testimony of Edward Schwind.)

Q. If you find a hop sample which shows brown, then you consider that unsatisfactory, do you?

A. Well, how brown?

Q. Let's say a dark brown.

A. The whole sample brown?

Q. No, just specked with little brown spots, little spots of brown in it?

A. If the whole sample is brown, well, there is no use to waste time.

Q. If you were not interested in buying hops at the time, if you had your full requirements, why did you go to the trouble of examining that sample?

A. I just thought I would take it up with the management if we did think that we needed hops. I knew that I could buy that hop for less than half. That is what I figured at least.

Q. Did you make other purchases of 1947 crop of hops after that time? A. Pardon?

Q. Did you purchase any 1947 crop of hops after that time?

A. Not after, no. Our buying is done during the crop, before the harvest. In fact, we are contracting as a rule.

Q. I am not clear as to just why you examined that sample if you had already done all your buying?

A. Well, I look at any sample a fellow brings in; just want to see if something has been slipped over on me, or if this hop is better or worse, and feel I should show that much interest and look at any sample that is left there. [151]

(Testimony of Edward Schwind.)

Q. Did you consider they would be cheap, a lower-price hop?

A. Well, I mentioned before that I thought if we would have been in need, I would have like to buy the hops.

Q. What price would you have been willing to pay at that time if you needed hops?

A. Well, we paid as high as 95. I knew I could have them hops for less than half; at least, that is the way I felt.

Q. Why did you think you could buy these hops for less than half of 95?

A. Because the hops had been rejected.

Q. Any other reason?

A. No other reason. I knew that hops was plentiful because there is lots of imported hops coming in.

Q. Do you also import hops?

A. Not for the last ten years.

Q. Do you know whether or not imported hops were coming in then because of the lack of good-quality hops produced domestically in 1947?

A. There is very few to reach America, but they would buy hops and bring hops in.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. What is the fact as to whether or not a hop sample will [152] deteriorate in time?

A. What is the fact?

Q. Yes. Will it deteriorate or not?

(Testimony of Edward Schwind.)

A. Absolutely; hops deteriorate.

Q. Can you take a sample of hops a year and a half after they have been baled and tell very much about what quality they are?

A. I don't have to——

Q. In other words, samples after that length of time do not help you very much in deciding what the quality was at the time of the baling? A. No.

Q. Is that right? A. Yes.

Mr. Kester: I think that is all.

Recross-Examination

By Mr. Kerr:

Q. If there were immature hops which had not grown to full maturity because of being affected by downy mildew at the time the hops were baled, would those immature hops show up a year and a half later in a sample?

A. As soon as I receive a sample I send it to the laboratory and wait for their report before I would go any further, buying or anything.

Q. Will you please answer that question, Mr. Schwind? [153]

A. No use to look at a hop sample a year and a half after.

Q. You said after a year and a half's time it would be impossible to determine what the crop conditions as to the hops had been. I presume you mean where they are baled. If they had downy-mildew affected hops in them when they were baled, these downy-mildew affected hops would still be apparent a year and a half later, would they not?

(Testimony of Edward Schwind.)

A. A year and a half hops is so cheesy you would be glad to throw them out of the brewery. That is my opinion. It is just not hops any more.

Q. Would there still be apparent in these hops these downy-mildew hops?

A. Well, I never had a look at them for that. I don't keep hops that long, a year and a half after they come in. A brewery is not doing that. We keep hops in cold storage under constant temperatures.

Mr. Kerr: That is all.

The Court: There will only be one more. You have had three now, three expert witnesses.

Mr. Kester: In view of your Honor's ruling——

The Court: That is not a ruling. That is the rule. It has always been the rule in connection with expert testimony.

Mr. Kester: I do not wish to argue the matter, but these gentlemen we have offered as witnesses and who have testified up to now, we have not offered as experts. [154]

The Court: They have testified as experts.

Mr. Kester: The thought I had was that they were familar with the particular transaction and testified regarding the transaction, rather than merely as experts.

The Court: Put on another one. You can offer a fourth one. I will decide when you offer the fourth one.

KARL SPRAUER

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is Karl Sprauer? A. Yes.

Q. Where do you live, Mr. Sprauer?

A. Mt. Angel.

Q. Mt. Angel? A. Yes.

Q. What is your work?

A. I am foreman on the College farm.

Q. That is the Mt. Angel College? A. Yes.

Q. As foreman on the farm do you have charge of the hop-raising activities? A. Yes.

Q. Are you raising hops at Mt. Angel now?

A. Yes.

Q. About how many acres of hops do you have there? A. 100.

Q. 100 acres? A. Yes.

Q. What do you do besides raising hops? [156]

A. I also pick them and dry them and bale them and have charge of the farm work.

Q. As manager, foreman, are you in charge of the hop-picking machine that you have there?

A. I run it myself.

Q. You run it yourself? A. Yes.

Q. With that hop-picking machine do you do commercial picking for other growers besides the College? A. I did.

(Testimony of Karl Sprauer.)

Q. How long have you had that machine there?

A. Two years.

Q. Do you know about how many bales you have picked with that machine during those two years?

A. I couldn't say now exactly. I believe the first year we picked around close to 800 bales.

Q. 800 bales? A. Yes.

Q. That would be in 1947? A. Yes.

Q. Close to 800 bales? A. Yes.

Q. Do you know how many different growers had their hops picked that way in 1947?

A. Yes. [157]

Q. How many?

A. I have to count them up first; five different growers.

Q. Five different growers? A. Yes.

Q. Did you pick both fuggles and clusters?

A. Yes, sir.

Q. About when did you start the picking machine operating in the fall of 1947?

A. I started—I think it was the 11th or 12th of August.

Q. The 11th or 12th of August? A. Yes.

Q. Did you run it continuously then throughout the hop season? A. Yes.

Q. For about how long? When did you shut down your machine, do you know?

A. I believe I ran it exactly five weeks.

Q. Five weeks? A. Yes.

Q. In addition to growing and picking and bal-

(Testimony of Karl Sprauer.)

ing, did you do any buying and selling of hops down there? A. Through the early years I did.

Q. Are you, yourself, a licensed hop dealer?

A. No. That goes in the College name, but I did the work.

Q. You did the work under the College license?

A. Yes. [158]

Q. As a dealer? A. Yes.

Q. Could you say during how many seasons you had something to do with buying hops, as well as selling them?

A. Oh, maybe ten or twelve, maybe fourteen years.

Q. How many years have you been dealing with hops, generally; that is, growing or buying and selling? How many years?

A. Since '15, every year.

Q. Every year since 1915? A. Yes.

Q. In your work have you had experience in looking at hops and determining their quality and condition? A. Pretty good.

Q. In making such inspection, do you buy and sell hops on the basis of your opinion as to their quality and condition? A. I do.

Q. During 1947 did you have occasion to examine hops and hopyards in the Willamette Valley generally?

A. I always do. I usually go around and see what other people do; keep in touch with the yards so that I am not too late or too early.

(Testimony of Karl Sprauer.)

Q. You make arrangements with those growers who are going to pick by hand so you know which ones are going to do that? A. Oh, yes.

Q. Who decides when the crop is ready to be picked? Do you do [159] that or the grower?

A. I talk it over with the grower, yes. If I see that his hops should be picked, I convince him to pick his hops.

Q. What is the fact as to the 1947 crop generally? What was the condition of the 1947 crop, generally?

A. 1947 looked especially nice. We had a little downy mildew and, as the downy mildew came on, naturally it showed up a little.

Q. Were you familiar with Mr. Geschwill's 1947 crop of clusters?

A. Oh, yes. I went there more than once and I looked them over so I would know when to start.

Q. When to start picking?

A. Yes. He was the first I picked.

Q. His was the first crop you picked?

A. That is the first crop that went through the machine.

Q. You think that would be about the 11th of August?

A. Yes. Then, also, I picked the first of the late hops.

Q. Before the hops were ready to be picked, during the growing season in 1947, did you have occasion to see how he was taking care of his crop, as

(Testimony of Karl Sprauer.)

to cultivation and such things? A. Yes, I did.

Q. Would you describe for us how he was taking care of his crop?

A. He had two yards. He had an early yard and he had a late yard, and the earliest always is coming on first. They looked pretty nice. You couldn't see any better yards around. They [160] looked in good shape. They was fine cultivated, fine trenched, was in good shape.

Q. Did you observe as to downy mildew conditions?

A. Oh, yes. I watched them. He didn't have no lice.

Q. No lice? A. No.

Q. How would you say his crop in the field compared with other crops in the fields generally in 1947?

A. I would say on the average his yard looked really a little better than farmers who didn't take quite as good care of it.

Q. How would you say it was, that average?

A. The hops, as far as that was, they looked—they was always nice. This yard was in good, thrifty shape, a nice green color.

The Court: How did his yard compare with others?

A. What is that?

The Court: How did his yard compare with others?

A. Very good.

(Testimony of Karl Sprauer.)

Q. (By Mr. Kester): Was it as good as or better than the average crop in 1947?

A. He had a good crop.

The Court: Was it good or better than average or worse than average, comparatively?

A. No, it was a good, average crop.

Q. (By Mr. Kester): You say the crop, of course, came through the picking machine? [161]

A. Yes.

Q. Would you describe how hops look after they come off the picking machine? What was their condition?

A. The hops, they looked very nice. People came in and watched that machine and they were always interested on how that machine picks, and his hops was the first late hops and also the first early hops that I run through the machine. They was all surprised at the hops coming through so nice.

Q. Was there any damage done in picking?

A. No, they wasn't. Them hops, they was run through the machine as quick as possible. There was no such a thing as your hops got bruised. We don't load too heavy and we pick them nicely. Through the machine we don't feed too heavy and it keeps them—keeps picking them nice, without being hurt.

Q. Did you do some of the drying and baling of the crop?

A. I did, all the hops what we run through the College hop house, dried and baled.

(Testimony of Karl Sprauer.)

Q. With respect to the Geschwill 1947 clusters, how were they dried? A. Well,——

Q. Were they done the same way as others? Were they well dried or properly dried, or what?

A. They was just as good dried as ever I would dry them, and we dried for lots of other people and always got to be careful that they was dried right; otherwise they are going to come back [162] on me.

Q. Were those hops dried as well as the hops are supposed to be dried in the hop business?

A. They was fine dried.

Q. How about the baling, was that done in accordance with custom?

A. Just the same as you would bale for anybody else.

Q. Would you say from your examination of these hops, both in the field and in the picking machine, and in bales, as to how they compared with other hops in the Valley, generally, that season?

A. They compared good. I want to say I picked our late College hops, and I had lots of people look at them, and Fred's hops was laying in the storehouse the same as ours, and I could have sold them just as good as the College hops.

Q. Were the College hops a good, average-quality hop?

A. They was about the same average as Fred's. Our hops went like hotcakes.

Q. You say they went like hotcakes?

(Testimony of Karl Sprauer.)

A. Yes.

Q. Would you say the Geschwill 1947 clusters were of prime quality? A. Yes.

Mr. Kester: That is all.

Cross-Examination

By Mr. Kerr:

Q. In buying from growers do you do any long-term contracting?

A. No. We didn't buy here in the last couple of years. Years ago I went out and did quite a bit of buying from growers, field-grown.

Q. The last two years?

A. Not for the last couple or four years, five years.

Q. For the last five years?

A. Yes. I don't know the year exactly. I could trace it up when we quit.

Q. For the last five years your purchases from growers have been all spot purchases?

A. I don't think I did. I would have to look that up in the office.

Q. Do you recall whether or not in 1947 you bought any hops on contract?

A. No, not 1947.

Q. 1946? A. No.

Q. 1945? A. I couldn't tell you that.

Q. Did you buy any hops from growers in 1945 or 1946 on spot sales, spot purchases?

A. No, we didn't. I would have to study up on that. I couldn't [164] remember now if we did.

(Testimony of Karl Sprauer.)

Q. You don't remember whether you bought any hops in 1945 or 1946? A. Yes.

Q. Perhaps you did not buy any in 1945?

A. Maybe not.

Q. And perhaps you did not buy any in 1947?

A. No, we didn't, in 1947.

Q. Why didn't you buy in 1947?

A. We shipped lots of hops back East, you know, years ago. We started in, I believe it was around 1935, buying them; for about seven or eight years I bought hops up every year.

Q. But in the last three years you have not bought up any hops?

A. In the last three years, I can't remember.

Q. Is there any particular reason why you haven't bought hops from growers?

A. No. We actually didn't make no profit out of them no more and we quit.

Q. You stated you examined the hopyards in 1947. Over what area did you examine the yards?

A. Oh, pretty near ever so often in the evenings or Sundays I drove sometimes for 20 miles, you know, and went to different hop growers' yards.

Q. Were those yards within 20 miles of Mt. Angel? A. Yes. [165]

Q. Did you go beyond that distance?

A. Oh, yes. I went to other places, and then I went up in other yards.

Q. Where?

A. Up in Salem or Independence.

(Testimony of Karl Sprauer.)

Q. Did you see any yards in the Grants Pass area? A. Yes.

Q. What yards particularly?

A. I couldn't tell you his name. I traveled around the territory.

Q. That was in 1947? A. Yes.

Q. Did you see any Washington yards in 1947?

A. Yes.

Q. What yards?

A. I was all around, around Yakima and——

Q. Did you see any of the California yards?

A. No, I didn't. I didn't go down there.

Q. You referred to Mr. Geschwill's 1947 crop in the field as looking better than some others or as looking pretty good or being a good, average crop. Were you comparing the Geschwill crop with the crops that you saw? A. Yes.

Q. Compared them with crops you saw, referring now to the Willamette Valley, or were those crops elsewhere? [166]

A. Around the Willamette Valley.

Q. Especially in the Willamette Valley?

A. Yes.

Q. What area do you mean by the Willamette Valley?

A. Oh, I would say as far as Independence, Salem, way down to Oregon City.

Q. But not including Grants Pass?

A. No. I wouldn't say Grants Pass; wasn't nothing there.

(Testimony of Karl Sprauer.)

Q. How about Eastern Oregon?

A. I was in Eastern Oregon.

Q. Were you comparing the Geschwill hops with Eastern Oregon hops?

A. No, Eastern Oregon didn't have as much show of downy mildew. They had a show of wind damage.

Q. That is the Eastern Oregon hops?

A. That means Eastern Washington.

Q. Did you see any Eastern Oregon hops?

A. No.

Q. Then the Eastern Washington hops in 1947 showed less mildew damage than the Oregon crop of hops? Is that right? A. Yes.

Q. Those were clusters?

A. Yes. As a matter of fact, there is very little downy mildew if any in Washington. They had a touch last year.

Q. What was the situation with respect to downy mildew in the [167] Willamette Valley yards?

A. The Willamette Valley, you know, is more hit with downy mildew on account we have a different atmosphere, different weather, colder weather, more fog, and such like, where Eastern Washington is more dry and warmer.

Q. Would you say the Willamette Valley cluster hops were more susceptible to downy mildew damage than the hops produced in other areas?

A. Yes.

(Testimony of Karl Sprauer.)

Q. As a matter of fact, there has been serious mildew damage in the Willamette Valley, has there not? A. I didn't get the question exactly.

(Question read.)

Q. (By Mr. Kester): What years?

Mr. Kerr: That one year, 1947, particularly.

A. There was. Anybody could see that there was downy mildew.

Q. Would you say it was a heavy attack or a light attack in 1947?

A. I always, when we went in, the way I told my boys, I said, "I bet we lose about 5 per cent." That is the way I told them. Naturally, people you know what didn't have yards quite as good in cultivation and not thrifty, they might have a little more on account there wasn't anything to overcome that sickness, just the same as a person is healthy and he can overcome sickness a little more. [168]

Q. Did you see any yards in the Willamette Valley in 1947, cluster yards, which were not affected by downy mildew?

A. I couldn't say that I did see any.

Q. Do you recall whether or not you did?

A. I didn't say that I couldn't see—couldn't say that I ever saw mildew on hops. You have got to be onto it, as you drive up. You have to stop and look.

Q. Did you stop and look at many of the yards you saw?

(Testimony of Karl Sprauer.)

A. I walked through many hundred acres.

Q. How heavily affected by downy mildew were those yards?

A. I saw some that was kept up in relatively good cultivation and fertilized good and maybe was irrigated and they didn't show so much. Others that was in poor condition, they showed more.

Q. Were there any that were badly affected by downy mildew?

A. Yes, I inspected some what was badly affected.

Q. How, in percentage, if you could estimate it that way, how badly affected were the College clusters in 1947 by downy mildew?

A. Just about like Fred's.

Q. What percentage of sales, or of bales, or what percentage of the production would you say was affected by downy mildew?

A. I judge about 5 per cent.

Q. You mentioned, I think, you did not bale any hops that were affected by downy mildew?

A. Yes, they was affected by downy mildew.

Q. Was that 5 per cent of the hops baled, hops affected by downy mildew?

A. Not all what was affected.

Q. Yet 5 per cent of those that you baled were affected by downy mildew?

A. No, they was all baled.

Q. Everything was baled?

A. Yes, everything was baled.

(Testimony of Karl Sprauer.)

Q. How did the downy mildew show up in the baled hops?

A. Naturally, you could tell that on the burrs. There is a little bit of red dust, you know, over the burrs. You could tell that just as plain as daylight.

Q. In other words, the presence of downy-mildew damage in hops is easily determined when you look at a sample?

A. You could tell it. I can.

Q. Just how does a sample, for instance, of hops look when it has downy-mildew affecting hops in it? A. I don't get that.

Q. I will repeat it. How does mildew damage show up in a sample? How does it look?

A. It just depends, you know. Wherever there is downy mildew, there is evidence right in it; in other words, some of the burrs show they are hit by downy mildew; that is all. A hop buyer could see if there was downy mildew or if there was no downy mildew, if he has got any experience in hops.

Q. Do you think it requires any particular experience in seeing these little brown downy-mildew affected hops?

A. If a man never went through downy-mildew hops or didn't know nothing about hops, he has got to be explained to first; he has got to be shown. But with anyone that knows anything about it at all, he can readily determine whether or not hops have been affected by downy mildew.

Q. He could tell readily? He could readily de-

(Testimony of Karl Sprauer.)

termine whether the hops have been affected by downy mildew?

A. You could tell it, if you have any knowledge, yes.

Q. Very well, now. Does downy mildew affect the development of the cone itself?

A. Sometimes. That is just a question. For instance, that depends when the downy mildew comes in. If the downy mildew comes in along the last five days the hops is growing, it don't affect so much.

Q. How would it affect these hops?

A. Affect them only in the blooming season.

Q. Will that show up on the petals or the cones?

A. No. It will show on the cone.

Q. On the cone? A. Yes.

Q. What happens to the cone as a result of that?

A. The cone, naturally, will discolor a little. It don't leave it green. It will show in a reddish color.

Q. Brown or reddish? [171]

A. Kind of brown and also reddish.

Q. Does downy mildew sometimes prevent the burr or cone of the hop developing to full maturity?

A. No, if the hops is fully matured, you know, it don't hurt no more.

Q. But if it came in early, then what is the effect?

A. Naturally there is that much more damage.

(Testimony of Karl Sprauer.)

Q. How does it affect the hop then?

A. Oh, if it comes real early, it might burn the whole blossom and it would not develop any hop.

Q. If it came in after the blossom had been developed and after the burr had started to develop, then what would be the effect?

A. Naturally, as I said a while ago, the burr will show some spots. Some spots might be shown.

Q. Will a burr sometimes show up in a bale as a small, brown, immature dead burr?

A. No. There is—when hit by downy mildew, there will be some.

Q. There will be some what?

A. Spoiled burrs.

Q. Bad burrs, is that right?

A. That is natural.

Q. Burrs which have not developed to maturity, is that right?

A. No, when hops is hit by downy mildew, every spot where it [172] is hit, it will show. I don't say that it would go clear around that burr.

Q. If downy mildew hits the vine before the burrs have developed or before the vine has blossomed, what will it do to the vine?

A. I saw it where we had mildew where there was no hops on the vine.

Q. It would prevent the development of any hops at all?

A. No, I mean before it ever blossomed we got mildew in and killed the vines.

(Testimony of Karl Sprauer.)

Q. If it developed, if the hop had started to develop after the blossom had formed, then what was the effect?

A. After that it will hurt the burr; it will hurt the leaf, if there is leaves formed. For instance, they are a half-inch long, the leaves; the leaves might curl up a little.

Q. When did downy mildew hit these Willamette Valley yards in 1947 or first affect the development of the crop?

A. Just about hit it when they was just about through blooming.

Q. Just about through blossoming, is that right?

A. Yes.

Q. Was the 1947 cluster crop harvested in the Willamette Valley later than normal or was it earlier?

A. No, it wasn't. It was the same time, right at the same time.

Q. It was a normal harvest, as far as the time was concerned? A. Yes. [173]

Q. This downy-mildew attack occurred, then, just after the blooming of the vines, is that right?

A. That happened just while the blossoms was formed.

Q. Was that an unusual attack of downy mildew as to the time of its taking place, as to the time of its affecting the vines, rather?

A. No, I saw that before. I saw it years ago

(Testimony of Karl Sprauer.)

when we had downy mildew. It took the whole yard.

Q. At blossoming time?

A. At blossoming time.

Q. How long ago was that?

A. There was such a case—I couldn't say exactly; it must be around twenty years ago.

Q. Have there been any such instances since then, do you know?

A. There was touches ever so often.

Q. But has there been any general attack of that sort in the Willamette Valley within the last two years, prior to 1946 or 1947?

A. We had a little downy mildew pretty near every year.

Q. Affecting the blossom, coming at the time of the blossom?

A. Oh, yes. There is such a thing like that pretty near every year.

Q. All over the Willamette Valley?

A. Oh, yes.

Q. Willamette Valley hops are likely, you say, to get an attack [174] of downy mildew, is that right?

A. It just depends on the weather. If you have nice weather, you know, we don't get it.

Q. What has been the case in the last ten years? Have we had weather that produces or produced downy mildew generally in the Willamette Valley?

A. The Willamette Valley is a little too cool at

(Testimony of Karl Sprauer.)

times; that is, when the hops are blossoming. It is a little too cold at night.

Q. I asked you during the last ten years has there, each year, been a general attack of downy mildew in the hopyards in the Willamette Valley at the time of blossoming?

A. Yes, I could say there was. You take in the first years, most growers didn't know what downy mildew was. Lots of hop men didn't understand downy mildew. We had heard of downy mildew twenty years ago. I bet one fellow with 35 acres, all cultivated,—I said, "I bet we don't pick one hop off of there, one bale of hops," and half of them hops all come out again; off the 35 acres he picked 175 bales. Those that wasn't hit by downy mildew came out again.

Q. Was that a case where the downy mildew hit the yards at the time of blossoming?

A. It got all black and then they come all out new.

Q. Did the Willamette Valley suffer any downy mildew attack in 1947 after the time of blossoming?

A. We had downy mildew last year. [175]

Q. Last year; you mean when, 1948?

A. We had downy mildew last year, too.

Q. 1948? A. 1948.

Q. During 1947 did downy mildew attack the Willamette Valley yards generally after the time of blossoming?

(Testimony of Karl Sprauer.)

A. No, I couldn't state exactly when the downy mildew hit. We had mildew.

Q. How did the downy mildew attack affect the crop in your yard; that is, the College yard?

A. Just the same as any others.

Q. What was the effect?

A. Little red spots showed through the hops.

Q. What caused these little red spots? Were they dead burrs?

A. It stops growing. That will naturally make that little spot on. If it stops growing, it will die down.

Q. That is to say, some of the hops would stop growing? A. Yes.

Q. Those appeared in the bales as little brown spots, is that right?

A. No. Might be a part of the hop it touched or might be all will die a little, and otherwise some burrs keep in nice performance.

Q. You referred to Mr. Geschwill's 1947 cluster hops, or his hops, rather, as about average, a good average crop. Were you [176] referring to clusters or fuggles or both?

A. No, he had a good crop on both yards.

Q. Were his clusters any better than his fuggles?

A. He had nice clusters there and he had a nice fuggle yard.

Q. Was one any better than the other?

A. Couldn't say.

(Testimony of Karl Sprauer.)

Q. Was one affected by downy mildew any more than the other?

A. No, the clusters was more affected than the fuggles.

Q. As a matter of fact, fuggles ordinarily are quite resistant to downy mildew? Clusters are much more susceptible to downy mildew, is that right? A. Yes.

Q. About your picking machine, what type of machine is it that the College operates?

A. A Danshauer.

Q. Are there other types of picking machines used in picking hops?

A. Yes, there is quite a few.

Q. Does the Danshauer machine remove from the hops, as they are put through the machine, all immature hops?

A. If I have to state, I will state it is the best machine of all in the State of Oregon and also Washington.

Q. Very well. Does it remove the immature hops as the hops go through?

A. No, it will take all the hops off and the leaves off. **[177]**

Q. Takes all the leaves and hops off?

A. Very fine.

Q. Picks the hops and leaves off the vines?

A. Yes.

Q. No matter what the condition of the hop is, it will be taken off the vine? A. Yes.

(Testimony of Karl Sprauer.)

Q. And go on through the machine, is that right?

A. Go through the machine and go to the cleaner.

Q. What does the cleaner do?

A. The cleaner takes all the waste stuff out.

Q. What do you mean by "waste stuff?"

A. For instance, like as we were talking about downy mildew in the bales, what was touched by mildew would fall off from the picking machine, blow that out on the waste.

Q. Blow that waste material out by the use of air pressure? Is that it? A. Yes.

Q. If it is the case of a cone or hop burr which is dead, would that be blown out, too?

A. Work it out, too.

Q. How do you get it out?

A. Work it out through screening.

Q. In addition to blowing this waste material out, you also screen it out? [178]

A. Also screen it.

Q. Does that screening take out the brown dead burrs?

A. If you pick by hand, you pick them and put them all down in a basket and nobody could separate them. By machine I get the most—I don't say all, just the most of it.

Q. If you have a green burr and a brown, dead burr of the same size, they will both go through the screen?

(Testimony of Karl Sprauer.)

A. They go out with the good hops. Otherwise I blow them all out.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. On this machine you have mentioned that the hops go through, does the blowing take out the leaves? A. Yes, they get blown out.

Q. In the hop business generally what is the meaning of the term prime quality hop? What does that mean in the business?

A. Well, I have always understood, you know, as long as we have prime hops—

Q. What does that mean? What kind of a hop is prime? A. That is an average hop.

Q. An average hop? A. Yes.

Q. Does it vary from one season to another, depending on the growing season? [179]

A. Not much.

Q. Pardon? A. Not much.

Q. When you say "average hop" do you mean an average hop for any particular season?

A. No, as the hops is raised and picked, there is usually so much waste in it. For instance, by hand-picking you have more chance of big leaves and stems in it. You might not call that hop choice. You will sell that as average, prime hop.

Q. A prime hop means an average hop, then?

A. Yes.

(Testimony of Karl Sprauer.)

Q. Would you say Mr. Geschwill's 1947 clusters were prime hops? A. Yes, sir; I do.

Mr. Kester: That is all.

Recross-Examination

By Mr. Kerr:

Q. That is, you mean to say they were average hops, is that right?

A. No, they are just as good one year—they was just as good as mine.

Q. Well, you have said a prime quality hop is an average hop. What do you mean by that, average or prime?

A. Mine was average, what I sold to the breweries.

Q. Average what? [180]

A. Average. That is a hop, you know, what I could put on the market anywheres, in the State of Oregon or in Chicago.

Q. Average of what, please?

A. An average hop is a hop what will go on the market and is going to be sold and it don't come back.

Q. That is your definition of a prime hop?

A. Yes.

Q. A hop which can be sold and won't come back? A. Yes.

Q. If Mr. Geschwill's hops could not be sold and did come back, they are not prime?

A. No, I call his hops prime hops.

Q. In all seriousness, I would like you to explain

(Testimony of Karl Sprauer.)

to the court how you would determine whether or not a particular lot of hops are prime hops. You say "average." Average of what? How do you determine that it is an average of anything?

A. Now, them hops what Mr. Geschwill raised last year, I would take them hops, if he would have told me, and would have sold them for him; I would have sold them to any buyers around here. I would have sold them just like hotcakes.

Q. If you had a contract requiring you to deliver prime quality hops, would you have considered those, then? What would you consider as a prime hop?

A. Any hops what goes through and don't come back.

Mr. Kerr: That is all.

The Court: Adjourn until tomorrow morning at 9:00 o'clock.

(Adjourned at 5:35 o'clock P. M.) [181]

(Court reconvened at 9:00 o'clock A. M., Wednesday, January 26, 1949.)

R. M. WALKER

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Will you state your name?

A. R. M. Walker.

Q. You are known as Mike?

A. That is right.

Q. Where do you live?

A. Independence, Oregon.

Q. What is your business? A. Hop farming.

Q. How long have you been engaged in hop farming? A. Most all my life.

Q. Has all your experience been here in Oregon? A. Yes, sir.

Q. What other businesses have you been engaged in?

A. Oh, banking for a great number of years.

Q. What bank are you connected with?

A. First National Bank of Independence. [182]

Q. What position did you hold with that bank?

A. President.

Q. As president of the bank did you have occasion to be familiar with the hop business as a banker as well as a grower? A. Yes, sir.

Q. Did your bank make loans to growers of hops? A. Yes.

Q. In that connection did you keep track of the

(Testimony of R. M. Walker.)

hop market and production and so on? A. Yes.

Q. What other connection have you had which would bring you into contact with the hop business?

A. Oh, I have been associated with it in different phases all my life, growing and buying and being familiar with the trade.

Q. Have you done quite a bit—Have you done any buying of hops?

A. In a small way, yes. Over a number of years

I have handled some small amounts of hops. I have not, though, for the past several years.

Q. On your own ranch what is your production of hops, usually?

A. Well, it varies greatly according to season; anywhere from 1200 to 2000 bales a year.

Q. Would that be one of the larger hop operations in the state?

A. I presume it would be considered so, yes.

Q. In your connection with the hop business generally, have you [183] had occasion to follow the hop market and be familiar with trends in the hop market?

A. Try to keep up with it, naturally, to be as informed as I can.

Q. Are you familiar with various sources of information with respect to production and market price and trends?

A. Yes, in consultation with brokers and growers and also government reports.

Q. Have you acted as a correspondent in furnishing information to the government in compiling those reports?

A. At different times I have received blanks from the U.S.D.A. in which they ask for report on growing conditions.

Q. That is the Department of Agriculture?

A. Yes.

Q. For their bulletins on the hop market?

A. Yes, bulletins on the hop market, and market conditions.

Q. Going back to the spring of 1947, I will ask

(Testimony of R. M. Walker.)

you what the general prediction in the trade was with respect to the 1947 hop crop?

A. You mean generally?

Q. Yes; speaking generally, what was the situation in the hop trade in the spring of 1947?

A. Well, as I remember, the growing season early looked very good. I think the prevailing price was generally within the range of about 45 cents, and the market maintained that position until [184] along in the summer.

Then, in July, we had the downy mildew attack which persisted up until the first part of August.

Q. Pardon me. Before we get along to that part of it, when you say that in the spring the prevailing price was around 45 cents, would that refer to contracts? A. Yes, contracts on the 1947 crop.

Q. Would that be the price fixed in these contracts?

A. There was considerable business done at that price clear up from early spring clear up to and through until in June; I would say, as I remember, probably 80 per cent of the Oregon crop was under contract, but not all of the contracts made at that period; some of them were long-term contracts which had been made in years previous to 1947. Most of the contracts were open-end contracts with the base price in them. The base price was anywhere from 25, which I believe was low, clear up to 65—to 60 or 65 cents.

Q. What is the normal production of hops in

(Testimony of R. M. Walker.)

Oregon? How many bales would be considered an average year?

A. That is a very debatable question. The way we have been operating in recent years, it has been running around 80,000 bales.

Q. You mentioned that along about the end of July or the first of August there was an attack of downy mildew. Was that quite general in the valley or was it spotted or how was it?

A. It was general all through Western Oregon.

Q. From your familiarity with hops, with hop farms generally, [185] would you say most of the farms, most all farms were affected, or were there some that were not?

A. I didn't see any yards that were not affected to some degree. The early varieties, the fuggles particularly, are fairly downy-mildew-resistant. You could find it in any field I visited to some degree.

Q. When this downy mildew attacked the end of July or first of August, what effect did that have on the market situation?

A. Well, it unsettled the market. Of course, you had this mildew attack right at the time they were blooming, and it blighted the bloom and, naturally, the local agents of the brokers, the eastern brokers, were worried about their appearance and they became very badly excited. Most of them, in fact, paid a visit to the districts, to see if they could get first-hand information, and they became alarmed, and they sent word to their customers, the breweries in this case. Promptly, the market commenced to advance very rapidly. It went from 45 clear to 85

(Testimony of R. M. Walker.)

and 90 cents; in some cases above-90-cent sales were made.

Q. You have mentioned that certain of the hop dealers came out personally. Did you talk to Mr. Robert Oppenheim of Hugo V. Loewi, Inc., at that time? A. Yes. I remember I saw him.

Q. Do you remember having any discussions with him?

A. I don't remember any particular discussions or anything that we talked about. I have known Mr. Oppenheim a great many years [186] and we visited and talked about the crop.

Q. During that period, if I understand, the market was quite excited because of the anticipated shortage. What was the general prediction in the hop trade as to how many bales the Oregon crop would produce?

A. It depended on which side of the fence you were on. I think it was pretty generally agreed among the trade that they probably wouldn't have over around 50,000 bales in the state.

Q. As against a normal of around 80,000?

A. Around 80,000.

Q. Continue and tell us what happened to the market after that, after the first of August, say.

A. The market, after it got up around the 80- to 90-cent range, it stayed that way until way up—I believe up until the end of November. Then it leveled away, because when the bale count came in—I don't remember the time the bale count was in;

(Testimony of R. M. Walker.)

usually in sometime in October—the market leveled away.

Of course, they wanted to retain that market, that level of the market, for the simple reason that most of the growers had open-end contracts at a selected date, at a high price for delivery, and the brokers, in turn, had made sales to breweries at the prices we had during that scare. They naturally wanted to maintain that level, so the market stayed pretty high up until towards the close of the year, away up to the end of November, and then it leveled away and commenced going down; of course, as we know, it went down [187] in 1948.

Q. What was the actual bale count of the production in Oregon, if you know?

A. I don't have the figures with me, but someplace around 82,000 or 83,000 bales, as I remember. That could be determined by the government reports.

Q. So the actual production turned out to be pretty much the normal amount?

A. Yes. That was brought about by the fact that the hops that year, after the mildew attack, made what we call a second bloom and made a second set in a great many cases, and the fields, you might say, flowered a second time and made a crop in lots of cases where it looked like they were hopeless.

Q. In such cases where they made a second blooming would the hops have a chance to become as large as if the first bloom had developed?

A. No, in some cases they didn't. They were

(Testimony of R. M. Walker.)

smaller varieties of hops; that is, didn't develop large cones, as usual.

Q. Generally speaking, were the smaller hops of as good quality as the larger ones would have been?

A. That is a very wide field, a very debatable question, but I considered them usable if they developed until where they get matured so they have their lupulin and so forth.

Q. You have mentioned lupulin. That is the pollen inside the hop? [188]

A. Yes, down at the base of the petal, golden-colored.

Q. Would it be a fair description to say that is the yellow or golden color based around the stem inside the hop cone?

A. Yes, at the base of the petal, down next to the core.

Q. Around that the petals fold up in clusters; is that right? A. That is right.

Q. Is that lupulin what the hop is used for in making beer?

A. That is what I understand, the main property of it.

Mr. Kerr: May I inquire of counsel if he is offering this witness as an expert on the brewing characteristics of the hops? If so, we object to the question.

The Court: Proceed, subject to the objection.

Mr. Kester: I do not intend going very far. I thought it might be of some interest here.

Q. What is the understanding in the hop trade

(Testimony of R. M. Walker.)

generally as to what use of the hop is made in making beer? That is, in so far as it is common knowledge in the hop business.

A. It is my general understanding that the hop is used primarily for flavor, aroma and flavor.

Q. What portion of the hop does that aroma come from?

A. From the lupulin primarily, as I understand.

Q. If there was an attack of downy mildew sufficient to discolor the petals, make some of the petals turn a slightly reddish tinge, but not enough to get inside the petals, would that ordinarily affect the lupulin quality? [189]

A. I never thought so. That, again, is a very debatable question. As you know, we have twelve or fourteen hundred breweries in the United States, or whatever it may be—I do not have the number. Brewmasters, of course, do not—they might use them or might buy them even though they showed that discoloration.

Q. Even with some discoloration of the petals the hop is usually considered marketable?

A. Yes, I would consider them so.

Q. Going back to the market in 1947, I think you have taken it up through November of 1947. What happened thereafter, in the first part of 1948?

A. The market leveled away and gradually went down. The sales of spot hops dropped down until they were hard to market. In other words, there was a pretty fair yield of hops. There seemed to be enough to meet the brewers' requirements. In fact,

(Testimony of R. M. Walker.)

the hops were pretty hard to sell at any price where the grower could get at least his cost out of them.

Q. Could you say approximately what the general price range was in April, 1948, for 1947 cluster hops, for prime quality?

A. I don't have the figures with me, but, as I remember them, they droped down to 30 or 40 cents; anywhere from 30 to 45 cents, as I remember.

Q. Would you say 37½ cents in April was the fair market price for prime quality 1947 clusters?

A. In April? I think so, yes. [190]

Q. After about November of 1947, along in there, would you say that there were very many actual spot transactions in hops, or was it mostly closing up open-end contracts?

A. State that question again, please.

Q. State whether or not hop transactions after about November, 1947, were mostly closing up open-end contracts, or were there more spot transactions that had not been previously contracted?

A. There weren't too many spot hops. Most of them were bought up previous to November, 1947.

Q. Can you tell us about how many hops are still on hand in Oregon now of the 1947 cluster hops, approximately?

A. I have not had occasion to check those figures.

Q. In so far as it is common knowledge in the hop business?

A. I do not have the figures, I am sorry, but I should think some of these brokers could tell you more about that than I can. I think probably there

(Testimony of R. M. Walker.)

must be six or eight thousand bales lying around someplace.

Q. Of 83,000 most of them have been sold down to around six or eight thousand, approximately?

A. Yes. That is just a rough estimate on my part, counsel.

Q. Would you tell us how the Pacific Coast shares in the hop business of the United States? Is there much hop production outside the Pacific Coast, or what is the fact?

A. The Pacific Coast grows practically all the hops. There are a few grown in New York State, but just a few. [191]

Q. There has been some mention of Eastern Oregon. Is that generally included in the Pacific Coast region?

A. Yes. A few are grown in Idaho, very small production in Idaho. A very small production has developed in recent years in the Ontario section of Eastern Oregon, particularly; a very small acreage over there.

Q. Does that extend up into Eastern Washington?

A. There are a few grown in the Puyallup Valley on the Sound in Washington—the first hops grown in Washington before the Yakima section was developed.

Q. Do market conditions generally affect all this area approximately the same, or are there variations from one place to another within hop-producing areas?

(Testimony of R. M. Walker.)

A. Yes, it varies on the Pacific Coast. Prices generally follow each other, depending upon the quality and so forth. Primarily, the markets are pretty much the same on the coast.

Q. What is the situation with respect to the number of large hop buyers operating in the area?

A. You mean in different states, or what?

Q. In the hop business. Is it pretty well concentrated in a few hands, or is it a widespread operation, the buying of hops?

A. The trend the last few years has been downward in the number of brokers in the business. Now we have gotten so the market from the growers' standpoint, is very limited, in just a few hands. [192]

Q. Are you familiar with the name of Hugo V. Loewi, Inc.? A. In a general way.

Q. Is that one of the large operators in the hop business?

A. Yes, it is considered one of the three largest operators in the United States.

Q. Would you tell us, from your experience in the hop business over the years, what has been the history of the hop market with respect to the relationship between price trends, supply trends and whether or not hops are accepted or rejected under contracts such as these? What has been the history of that?

A. Well, generally, we meet that in individual cases as they arise, but that has been governed a great deal by supply and demand.

(Testimony of R. M. Walker.)

If there is a shortage of hops, it is much earier to sell than when there is a surplus of hops.

Q. During a time when the supply is short, as you say, do the buyers customarily find any fault with the quality of the hops?

A. That is true in hops as it is in most every critical commodity. That is one of the things that we, as farmers, have to combat all the time, not only in hops but other agricultural commodities.

Q. During a time when hops are in considerable supply, has it been your experience that buyers will attempt to find defects?

A. It is very easy to find a defect, if they want to search for it, which they generally do, if there is an oversupply of hops.

Q. What is the fact as to whether or not the various factors [193] describing a hop tend to vary from one season to another or from one place to another?

A. No, I don't think that varies very much.

Q. Is the type of hop, the character of hop, affected much by weather conditions, or growing conditions, or what is that situation?

A. Oh, yes, weather has a great deal to do with it, whether you have a rainy season or whether you have lots of fog or whether you have a freeze. All those things influence the hop.

Q. Do those vary from one season to another?

A. They vary from one season to another and during growing seasons.

Q. What is the fact as to whether or not a prime

(Testimony of R. M. Walker.)

hop, a merchantable hop, is acceptable depends on the season in which it is grown? Is there any relationship there?

A. Well, I think, yes, that farmers have always contended that a season has a great deal to do with what is a prime hop.

Mr. Kester: I think you may inquire.

Cross-Examination

By Mr. Kerr:

Q. I believe your hop operation is under the name of the Oregon Hop Company?

A. One operation is, and one in my own name.

Q. Then you have produced hops as an individual and also as a [194] company, of which you are an officer? A. That is correct.

Q. You referred to hop market prices and to certain government reports. Specifically, what reports were you referring to?

A. U. S. Department of Agriculture reports.

Q. What is the nature of those reports?

A. Well, the government generally gives monthly or weekly reports on marketing conditions in the three Pacific Coast states, and then generally a little paragraph about general conditions in the market.

Q. Is that what is known as the Hop Market Review? A. That is right.

Q. Published by the United States Department of Agriculture? A. That is right.

Q. Production and Marketing Administration?

A. Yes.

(Testimony of R. M. Walker.)

Q. You consider that to be a reasonably accurate report?

A. We have always followed it generally. It is usually a little behind the market. If the market is either advancing or declining rapidly, they are probably fifteen days behind, but it probably took them that long to gather the news from the three states which they compile for the publication.

Q. You understand the 1947 hop market price remained somewhere between 80 and 90 until sometime around in November, 1947?

A. I would have to consult the reports, but generally I think [195] that is true, Mr. Kerr.

Q. Such price uniformly prevailed throughout the Pacific Coast, is that right?

A. Pretty much so, I think.

Q. That is normal, is it not, that the price quoted for Pacific Coast hops is generally uniform between Oregon, Washington and California, for the same kind of hops?

A. For the same kind of hops, they are fairly close.

Q. What type of hops is produced in Washington?

A. They have up there—they grow early cluster hops and late cluster hops. There are a few fuggles grown in Yakima; some grown around the Sound, but in the Yakima section there is very few fuggles.

Q. These Washington cluster hops are the same as those grown in Oregon?

A. A majority of their crop up there is what we

(Testimony of R. M. Walker.)

call a seedless hop. I think the largest per cent are seedless in that district.

Q. Then, you then do compete directly with the Oregon seedless?

A. Yes. We don't grow so many seedless in Oregon, a very few.

Q. In California what types of hops do they produce?

A. They grow fuggles and clusters primarily; very few early clusters but primarily fuggles and clusters.

Q. Hops grown in California each year compete directly with hops grown in Oregon?

A. Yes, that is right. [196]

Q. California produces a seedless type of hop, too?

A. Not as much as they do in Yakima. They grow quite a few seedless down there in some districts of California but not as many as they do in Yakima.

Q. The California seedless hop competes directly with the Oregon seedless?

A. Yes, with the few we have. We do not have many seedless here.

Q. Getting down to April, 1948, I believe you expressed the opinion that the market at that time for 1947 prime quality hops was between 30 and 45?

A. I think somewhere in that range, as I remember.

(Testimony of R. M. Walker.)

Q. Are you sure that market was on prime quality?

A. When the market goes down like that, it doesn't make much difference what the quality is; whether they are seedless or semi-seedless or what does not seem to make much difference when hops get down to a low figure.

Q. Those were spot sales?

A. Yes, spot sales.

Q. Spot sales are made on sample?

A. Primarily so, yes.

Q. And not on contract? A. No.

Q. When we say that sales are made on sample, we mean that the seller submits to the prospective buyer a sample which he represents to be representative or typical of the hops which he is [197] offering?

A. Usually a representative of the broker goes to the warehouse of the grower and obtains large samples which are used for that purpose.

Q. Then the buyer determines from that sample whether or not that lot of hops is of the character and condition that he is willing to pay the price for?

A. After he looks at them I presume, if they satisfy him, he pays for them.

Q. In some cases a buyer would actually pay at the market for off-grade hops in order to meet a demand for cheaper hops?

A. And they always found a place for them.

Q. At a price? A. At a price.

(Testimony of R. M. Walker.)

Q. So that hops sold in April, 1948, actually would not be sold as prime quality but would be sold on sample?

A. They are sold on sample whether prime or not, prime quality. Any hops sold were sold on sample.

Q. That is, spot sales?

A. Yes, or contracts either.

Q. Prime hops on the Pacific Coast are contracted for between the grower and dealer as prime quality hops, are they not?

A. Unless the contract reads otherwise, which I don't think they do. They always say, "prime quality."

Q. In such contracts the hops called for are choice hops? [198]

A. I never had one. I couldn't answer that.

Q. As far as grower-dealer contracts are concerned, the Pacific Coast term is "top quality," is it not, in contracts? A. Yes, that is right.

Q. Then this market level which you referred to as prevailing for the 1947 crop of hops in April, 1948, was the spot sale market?

A. Is that a question?

Q. 1948. This market price that you refered to as prevailing for 1947 hops, in April, 1948, was the spot sale market? A. Oh, yes.

Q. And a market represented by sales on samples?

A. Sales on samples, that is correct.

Q. As a matter of fact, there were few, if any,

(Testimony of R. M. Walker.)

really prime quality 1947 crop of hops left in the hands of growers in April, 1948?

A. Very few of what I would say were top quality hops.

Q. And by "top quality" you mean "prime quality?"

A. The better grades of hops.

Q. You have referred to the term "prime quality hops." Just what do you mean by "prime quality?"

A. I do not pose as an expert on that at all, but it has been my understanding that a "prime quality" hop is a hop that has been well grown, harvested and cured, and of an even color.

Q. Would you say of good color?

A. Yes. [199]

Q. And would you say free from damage by vermin or disease?

A. Well, it has to be. It can have a small amount of discoloration, some slight discoloration from wind whip or just a slight touch of spider or just a slight touch of mildew. It does not particularly or materially damage it at all. If it has an excessive amount, however, it would not be considered of prime quality, no.

Q. Then, describe what you consider to be an excessive quantity of mildew damage.

A. That is very debatable, Counsel, I think. You are getting into a pretty broad field. If you want to argue about that, I think we could argue it all day.

Q. Do you think you can take a sample of hops

(Testimony of R. M. Walker.)

and, by examining it, determine to your satisfaction whether or not an excessive quantity of mildew damage is shown?

A. It has always been my understanding if mildew attacks hops just below the outside petal and does not get down to the base where it digs down into the core and do damage to the lupulin, while among the trade, brokers and some brewmasters, it might not be considered what they call a prime quality hop, it is perfectly usable and marketable and, therefore, should be accepted as such.

Q. You are referring to mildew damage that affects the petals but not the core itself?

A. On the outside petal; it does not get down to the base of the [200] petal so it goes into the core and destroys the lupulin. It does not destroy the brewing quality of the hop.

Q. Then you consider the severity of the mildew damage does affect the hop?

A. I don't think it affects the brewing quality of it, if it does not affect the lupulin of the hop.

Q. If mildew damage results from failure of the burr or cone to reach maturity, would you say that was serious damage?

A. When we had these mildew attacks, some of the arms and some of the laterals from the arms fell or failed to produce hops, became blighted. Then, sometimes they will come out and make a second growth and put on hops later. Those hops don't get as large as average hops. They are smaller; and if they go ahead and are enough advanced

(Testimony of R. M. Walker.)

when we harvest, so that they have lupulin enough and so forth, in my opinion they are perfectly usable. If there is a lot of brown, dried-up nubbins, of course, that is something else. Then you have got real damage.

Q. Yes. The brown, dried-up nubbins you consider to be a severe damage? A. Yes.

Q. They will actually be worthless to anybody?

A. If there was a quantity of those in the hops, then I would say you had some real damage.

Q. You believe the presence of those nubbins would prevent them from qualifying as prime quality hops? [201]

A. If there was an excessive amount of them, yes.

Q. Would you state to the Court what you consider to be an excessive amount of these nubbins in a sample of hops?

A. I think you would have to break the sample open and sort them out and put them out on the board, if you want to really determine that.

Q. Would you say 50 per cent mildew damage in a hop sample was an excessive amount of mildew damage?

A. Depends on what you call mildew damage. I don't know. If you are going to call those nubbins mildew damage, yes; if you are speaking about nubbins where there is just some discoloration, no.

Q. 50 per cent nubbins, would you call that an excessive amount?

(Testimony of R. M. Walker.)

A. If there is 10 per cent of just nubbins, I would think you have got some mildew damage there, if it has discoloration in.

Q. Would you call that an excessive damage, 50 per cent nubbins? A. Oh, yes.

Q. 10 per cent nubbins?

A. I think 10 per cent nubbins would affect the quality of the hop, yes.

Q. Five per cent?

A. Well, you are getting down pretty fine when you are getting down to five per cent of anything.

Q. Five per cent by weight?

A. Well, you are getting down pretty fine. It is a very small [202] amount of anything, whatever it is, whether it is a hop or a stem or what it is.

Q. The presence of 5 per cent of off-color material would greatly affect the sample?

A. It will show up in a sample, but does not affect the uses of it particularly.

Q. Have you ever sold to breweries?

A. Not direct to breweries. I have always sold through brokers.

Q. It is customary for brokers to inspect and sample or grade your hops on the basis of visual and smell tests?

A. Up until recently, up until recent years, our selling was done on aroma and——

Q. In recent years?

A. Starting in 1930, as you know, we established the grading of hops more or less by leaf-

(Testimony of R. M. Walker.)

and-stem content, and so forth. Then, of course, over the last few years there has been a chemical analysis used in a great many cases by some concerns and some brewers.

Q. Have you ever sold hops to a dealer on the basis solely of a chemical analysis?

A. I never have, no.

Q. Do you know of any grower who has sold solely on the basis of a chemical analysis?

A. Not in my particular district. I have heard them talk about it a great deal, but I never have heard of it. [203]

Q. So that sales by growers to dealers are based upon visual and smell tests and seed, leaf-and-stem content?

A. That has been the usual practice, yes, in the trade.

Q. I believe you said that to quality as a prime quality hop a hop must be of even color and of good quality. For instance, if they are all black, that would be even but you would not consider that——

A. It depends. You can have a dark-colored hop. In other words, in some seasons we have particular types of weather and you may get a field where the hops are not a bright color; they are a dull color, but they run fine, if they are properly cured and handled.

Q. This dull color you refer to is not due to disease or mildew damage?

(Testimony of R. M. Walker.)

A. Some seasons it is not; we get what we call a dark mud color. They are not what I would call select as we would like to have them.

Q. What causes that muddy color?

A. That depends again on, as I always think, the weather conditions.

Q. That is not mildew damage?

A. No.

Q. Are colors affected by the degree of maturity?

A. Well, yes; after a hop gets ripe it is like any other fruit; if it becomes ripe, it will commence to turn in color and get to be a dark color. [204]

You take twenty-five years ago, for example, when we exported a great many hops to England, the English buyer would not accept bright green hops; they wanted what they called ripe, golden-colored hops because to them that meant the lupulin was more developed; they said it had more brewing qualities. They liked a hop that showed some discoloration. They preferred it over the bright green.

Q. The color that is now generally preferred in the trade is greenish or yellow?

A. With the development of this seedless hop, and this new crop of brewmasters, they want a medium green, I would call it, a kind of a weak smelling hop, in my opinion.

Q. Then, with decidedly greenish-colored hops, brown nubbins resulting from mildew damage are very conspicuous?

(Testimony of R. M. Walker.)

A. If you get a lot that have really been damaged by mildew, where there is a little round, you might say—where there is a little round spot about the size of a pencil, just a little hard lump in there—enough of them in there, it would damage the hop, yes; if they are just discolored on the petals, why, no.

Q. What was the mildew experience of the Oregon or, at least, the Western Oregon hop growers in 1947? Will you trace the development, if you can, of the downy mildew during that season?

A. We didn't have a great lot of mildew in the spring of 1947. It wasn't severe. Most growers, of course, now are equipped with different types of spraying machines and they take care of the plants.

Then, in the summer, in July, we developed a very severe attack of mildew which prevailed up until in August. It looked like probably we really would not have a great many hops in the State of Oregon, but, as I said a while ago, the hops came on and made a second growth and flowered a second time, so we ended up with a pretty fair crop, some 82,000 or 83,000 bales, where earlier it looked like we might have only 40,000 or 50,000 bales.

Q. Was that second blooming you refer to typical in Western Oregon, or was that merely a condition that prevailed in your own yard?

A. No, I think it was pretty general over the hop territory. I think it was true particularly of

(Testimony of R. M. Walker.)

fields that got proper cultivation and care. I think it was pretty generally true.

Q. Then it is your considered judgment that there was a second blooming in Western Oregon yards?

A. I think so, all fields I visited.

Q. Did the downy mildew in 1947 hit the yards around blooming time?

A. It started earlier—some of the earlier developed yards were commencing to get ready to bloom as late as July and the first part of August, and that is when we had our severe attack.

Q. How about the clusters?

A. In the clusters, too. [206]

Q. So it did hit the clusters quite generally during the blooming season? A. Yes.

Q. Was that extraordinary and unusual to have a mildew attack in that stage of the development of the hop?

A. I don't understand that question.

Q. Had previous attacks of mildew in other years, at that time?

A. We might have it at any time.

Q. At any time?

A. Some seasons we have had it in the spring, when the hops were first starting to grow in the early spring, and then we would have to ground-dust them. We might have it after their first trailing in the early spring, or at any time we might get an attack. We have had to cut them down

(Testimony of R. M. Walker.)

and cut them off and wait for the second growth which we might get, as we did that season. When that happens—one year, after we were half through harvesting, we had an attack of it.

Q. When downy mildew hits a yard early, then merely the vines are affected? A. Yes.

Q. It may be that, even though a sprig or a vine is affected with downy mildew, and you cut it off or otherwise dispose of it, other vine may develop from the root? A. That is right.

Q. That is the situation which develops when an attack comes [207] early?

A. Yes, usually.

Q. On the other hand, if an attack comes after blooming or after the burr or cone has formed, then you have a different type of damage?

A. Yes, naturally would be.

Q. In that event, either you will have no hops at all or you will have so-called blighted hops, is that right?

A. Well, you could have both. It might, in some field, hit just certain hops. You might have a particular corner of your field where it will be prevalent and in the other corners you will have none, you might say.

Q. If mildew strikes at a time that the hop cones are developing, have not reached full maturity but are developing, then the cones themselves will be affected, will they not?

A. If it hits after or just before, you might

(Testimony of R. M. Walker.)

say, they are fully grown, or two-thirds grown, it is pretty hard to overcome. You generally have some damage, then.

Q. What was the situation in that respect in 1947? Did mildew strike or was there a downy mildew attack that struck after the cones had started to form?

A. In some fields they struck after they started forming. In some cases it did not.

The mildew attack as I remember, generally speaking, started along up in July, pretty well up in July, and extended up [208] into August quite far, but the worst damage was already done along the end of July. In August the second growth came.

Q. Was there an initial attack of downy mildew in Western Oregon in 1947 which then subsided and a second or successive attack which then came later after the blooming?

A. No, I don't think so. We had a little of it, but, of course, we dusted quite thoroughly all during the season of 1947. There were lots of preventive measures used in our fields.

Q. Do I understand you correctly to say that the 1947 downy mildew attack in Western Oregon was spotty? That some yards were affected more heavily or more severely?

A. It was pretty general all over Western Oregon, but it hit some sections worse than others.

Q. Some yards were not affected while others were?

(Testimony of R. M. Walker.)

A. Oh, I didn't see any fields that were not affected to some extent.

Q. Were some of them hit at different periods, one yard getting an early attack and another yard——

A. Pretty hard to determine. No, I think they hit along pretty much with any month there.

Q. Were any of your yards affected by mildew?

A. Quite severely, in some cases.

Q. As a matter of fact, you did not harvest some of your late clusters because they were badly mildewed?

A. In some fields there I left some hops. [209]

Q. Why?

A. Because they were so badly affected with mildew.

Q. During what period of the development of the hop did that happen?

A. Over in my particular section that probably hit worse right in one area, right across the river from Independence. I think probably that was the most severely hit section that I saw in the Willamette Valley. I don't know why, but there was a small acreage in there, a few hundred acres along the river, that seemed to be affected more than any other place. I don't know why. I was just one of the victims, I guess, that season.

Q. Did the attack in that area come after the hops were beginning to form?

(Testimony of R. M. Walker.)

A. It came when they were flowering and carried through for quite a while, yes.

Q. So that prevented the development of this second blooming that you refer to?

A. No, that went on and we made a pretty good crop over there, but it was hard to keep it out. We had some good hops.

Q. That particular yard which you say you did not harvest, was that——

A. I didn't have any yards that I didn't harvest any hops—I mean places, I mean different ranches.

Q. Then you picked selectively?

A. Can't say that. I picked along until fairly late in the [210] season and then quit along late in the season.

Q. What I am trying to get at is why you failed to harvest your full production because of mildew?

A. Because my yards were damaged to such an extent I didn't think I wanted to go ahead and harvest.

Q. You harvested a few yards and then stopped?

A. Yes.

Q. In other words, you harvested a portion of your crop that you felt were of prime quality?

A. Yes, harvested all I thought I was going to be able to market. Labor conditions were very bad—you must understand we had a tough labor condition in that district and the weather wasn't good at all, and harvesting was very expensive. The

(Testimony of R. M. Walker.)

weather wasn't very conducive for harvesting, so we finally pulled out. We have done that during lots of years for different causes, for whatever the conditions were. We have done that before.

Q. You made it a point not to harvest and mix blighted hops in with your good hops?

A. Yes.

Q. If you had done that, that would have ruined the quality of your hops? A. Done what?

Q. Mixed the blighted hops, so-called blighted mildewed hops in with your good hops?

A. We had some damage all the way through—I wouldn't know how [211] to answer that question.

Q. If you had harvested your full crop, what would have been the effect on the quality?

A. I had some places in my field that, if I had harvested, would have affected my hops.

Q. With reference to the green color, I believe you said green-colored hops were immature or early harvested hops. As a matter of fact, hops which are grown under irrigation have a rather decidedly green color, even when fully matured?

A. That is not true in all cases.

Q. Is that true in Yakima?

A. I think the soil type there affects that a great deal. Yakima, as you know, has a different type of soil than we have in Oregon. They cannot grow anything unless they have water.

Q. In some cases, because of the soil or agri-

(Testimony of R. M. Walker.)

cultural practices, irrigation or otherwise, hops are green-colored, decidedly, even though fully matured?

A. Yes, and I have seen hops spoiled with water, too.

Q. After hops are harvested, taken off the vines, is it not a fact they may very easily be ruined because of bad handling?

A. Oh, yes, that can happen.

Q. So that the mere fact that a grower may have vines, immediately prior to harvesting, a fine-looking crop of green hops, does not mean necessarily that in the bales these hops will be of merchantable quality? [212]

A. That can happen, yes.

Q. Getting back again to the market price for hops in April, 1948, do you know what the market price at that time for Yakima prime quality seedless hops was?

A. No, they generally retain a price somewhere up about 10 cents a pound above the seeded type, usually.

Q. Was this market price of 30 to 45 in April, 1948, your own impression of the market price of seeded or seedless types?

A. Usually when hops get down cheap the variation in price does not maintain itself, when hops get down cheap. It does not seem to make very much difference whether they are seedless or semi-seedless or what; does not seem to make much dif-

(Testimony of R. M. Walker.)

ference, when hops get down as cheap as that, in finding a place for them.

Q. What do you mean when you said the Yakima seedless type of hops would have a differential of 10 cents?

A. Usually in ordinary practice, in all contracts or anything like that, there usually is a variation in the contract price and when the markets are higher there usually is a variation in price. They try to retain that price.

Q. You refer to the spot sales market?

A. When hops are cheap, that don't make much difference; it varies sometimes.

Q. Then it is your opinion the market price on prime quality seedless Yakima hops in April, 1948, was between 30 and 45?

A. I didn't check the Yakima market; had no occasion to, not [213] being a buyer. I am not in position to really answer that question.

Q. Then your reference to the market price for prime quality hops in April, 1948, was limited to other areas? Limited to other hops?

A. It would be limited to Western Oregon cluster hops or the regular seeded type of hop.

Q. Was your 1947 experience with downy mildew typical of your experience over a period of years?

A. No, that was the most severe year I had.

Q. As a matter of fact, the most severe downy mildew attack the Willamette Valley had had for many years?

(Testimony of R. M. Walker.)

A. I think probably that is true.

Q. Isn't that true because the downy mildew, unlike other years, hit after blooming or during blooming rather than just when the vines were developed?

A. Oh, of course, after it hits a second time you can't go ahead and make a full crop. That year was very unusual. As I said, they came out and made a second growth and made a very fair crop, but, even so, mildew was in those fields. There was some damage there all the way during the season.

Q. These six or eight thousand bales of 1947 crop of hops that you said were still unsold are off-grade quality?

A. There are some good quality 1947 hops.

Q. Most of them constitute hops which were rejected under prime [214] quality contracts?

A. In some cases, yes.

Q. Do you still have any such hops?

A. I have 286 bales of 1947 hops.

Q. Those were rejected?

A. They were rejected by Mr. Oppenheim.

Q. Also, some of your 1947 crop was rejected by John I. Haas, Inc.?

A. No, we arrived at a settlement on those.

Q. But they were rejected under the contract originally?

A. No, he accepted probably about half of mine,

(Testimony of R. M. Walker.)

accepted one field entirely and another field I kept and resold later myself.

Q. The John I. Haas, Inc., hops which you agreed to were prime quality?

A. I couldn't see very much difference myself between the ones they accepted and the ones they did not accept. I was satisfied with the settlement I received from them and we settled.

Q. Did they accept some of your 1947 crop as prime quality?

A. I don't know whether they accepted them as prime quality, but they accepted them.

Q. At the full market price?

A. Yes. I think I received 55 cents or some such an amount. I have forgotten how much it was.

Q. Some of your 1947 crop had actually been rejected by the same dealer when it came to the contract? [215]

A. I guess you could call it rejected. We arrived at a settlement.

Q. At a lesser price than the contract price?

A. No, wasn't any agreement. I delivered one group I think to them at some 80 cents and the other one I kept and resold myself. I didn't wish to quarrel with them. I had personal affairs to attend to and was away and when I came back we got together and settled the thing.

Q. You still have how many bales of your 1947 crop?

A. I have 286 bales, 1947, one lot left.

(Testimony of R. M. Walker.)

Q. Do you consider those of prime quality?

A. In my opinion they are good, merchantable hops, yes.

Q. Prime quality?

A. Well, I don't think I would call them prime quality, no, but I call them good, merchantable hops. I still contend they are of just as good brewing quality as hops that were accepted from us.

Q. In your opinion does the term "prime quality," as used in the hop trade, mean an average quality of hops produced in the Willamette Valley during that year?

A. I think that is a factor in it. Over the many years that I have been individually associated with the hop business we have always considered that as a factor in determining what is considered a prime quality hop. I think, if you want to get down to it, I suppose, scientifically, prime quality would have to be described as not damaged, but we have always considered the year [216] as one of the determining factors.

Q. What do you mean, "one of the determining factors"? Let me ask the question again. Do you consider the term "prime quality" as used in the trade to mean the average quality of hops produced in any year in the Willamette Valley?

A. Well, that is a rather broad question you are asking me. If all the hops in the state, for example, were damaged to such an extent that they would not have brewing qualities, I would say that

(Testimony of R. M. Walker.)

there would not be any prime hops at all that year.

Q. As a matter of fact, that would be an impossible situation.

A. That is right. We have never had that.

Q. I mean if the average quality was heavily damaged by mildew, you would not consider that a prime hop?

A. If, as I stated previously, the mildew extends into the core of the hop, where it affects the lupulin in the hop, in my opinion it would be not a prime quality hop and would not have good brewing qualities.

Q. Then if the average crop in the Willamette Valley turned out that way——

A. On the other hand, if it is not damaged, my opinion is that there is still brewing qualities.

Q. If the average of a particular year's production of hops in Oregon included what you consider to be a heavy percentage or a heavy proportion of these nubbins, then you would not consider them to be prime quality? [217]

A. If the percentage was high of nubbins, I would say no. I do not mean small dried leaves. That does not bother it much. If it is one of these little round dried-up things, that don't add anything at all; that is, what we call nubbins, yes. If there is a large amount of them, it would affect them materially.

Q. In other words, in your opinion it is not accurate to say that in the trade parlance "prime

(Testimony of R. M. Walker.)

quality" is the average quality hops produced in the area, during that year, irrespective of what the average quality is?

A. That is a debatable question.

The Court: We will suspend for a few minutes here.

(Recess, during which the Court proceeded to the transaction of other business.)

Cross-Examination
(Continued)

By Mr. Kerr:

Q. Would you mind stating the price at which you sold your rejected 1947 clusters?

A. 45 cents.

Q. When were they sold?

A. Sold to J. W. Seavey Company. I can't recall the date, but I believe it was in January, 1948.

Q. January, 1948?

A. I could be wrong on that.

Q. Do you know what the market price for prime quality cluster hops was at that time?

A. No, I don't. [218]

Q. Would you say the term "prime quality" as used in the hop trade means the same with respect to Washington hops that it means with respect to Oregon hops?

A. The price range is pretty much the same all over the Pacific Coast area, the hop-growing area.

Q. The term "prime quality" as applied to hops

(Testimony of R. M. Walker.)

of the three states on the Pacific Coast means the same thing, is that right?

A. I think pretty much the same, yes. I am not so familiar with Washington and California as I am with Oregon, of course, but I think it means pretty much the same thing.

Q. So, in judging whether or not a lot of hops is of prime quality, you do not take into consideration the state in which they are grown?

A. I am not familiar enough with other states, but I would not think there was any reason why you should.

Q. Under these term contracts, so-called futures, is it the general practice to obtain advances from the buyer?

A. Usually the broker makes the advance, makes an advance of some kind for spring work, and some for harvesting advances, whatever is agreed on in the contract.

Q. Why has that advance been through the buyer rather than through private banks?

A. It has been a trade practice that has been developed over a great many years in the hop industry. I think it is probably an unusual condition. I know of no other agricultural crop where it [219] is done as it is in hops.

Q. Do you know what the cause of that practice is?

A. I don't know how it was developed. It was developed, I presume, primarily by the brokers,

(Testimony of R. M. Walker.)

originally, in competing for hops so they could sell to breweries, primarily. I think that is how it started.

Q. Isn't it a fact a grower cannot get advances from a private bank?

A. It has become exceedingly difficult. The banks, since the so-called bank holiday in the early '30s, the banks have become much more cautious and have become much more supervised and, as a result, all kinds of financing have become more difficult. As you know, there have been other agencies developed to take care of a great deal of that.

Q. It would have a very serious economic effect upon the Oregon growers if that source of financing were withdrawn?

A. I think if the brokers ceased making contracts on futures, you could see two developments: Some growers would be pushed out of business, and you would see probably the development of farmers' cooperatives which would make it possible for them to obtain finances through the banks—cooperatives and other Government agencies.

Q. Then, as industry is now organized and as it now operates, you would say that these future contracts are necessary to the grower in order to obtain finances, is that right? [220]

A. In some cases, yes. Some growers are able to take care of it. It would depend on the individual case entirely.

Q. One more question: I believe you said in your

(Testimony of R. M. Walker.)

judgment a lot of hops which had as much as 10 per cent nubbins content were not of prime quality.

A. It depends on what you call a prime quality hop again. I think that it is usable from a brewer's standpoint, that nubbins may be considered like the other extraneous matter, leaf and stem and other foreign matter in the hop.

Q. You believe the trade considers that, as between grower and dealer?

A. I think the broker would consider that on any form of hop.

Q. That would be true, wouldn't it, even if the average hop crop for Oregon for that particular year had as much as 15 per cent nubbin content?

A. Yes, I think that is true.

Q. Are you personally informed as to the method by which breweries judge hops?

A. Not particularly breweries, no. I don't think the brewmasters agree. I think if you got 50 of them in a room, I don't think you would get one out of ten of them to agree on that particular subject.

Q. You know nothing about the terms of contracts between dealers and breweries?

A. I have had no occasion to go into the terms of contracts between [221] brokers and breweries.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. Counsel asked you about your operations for yourself and the corporation. Are your operations

(Testimony of R. M. Walker.)

affiliated with those of your broker?

A. We operate separately on different yards. He has yards which he operates separately and I have yards which I operate separately, although we work together and have this company.

Q. Are you familiar with his yards and his experience as well as your own?

A. Yes, I think I am.

Q. In reference to these nubbins that have been referred to here, I understood you to say they were like any other extraneous matter, like leaves and stems.

A. I question very much whether they would—in other words, I think if they are dumped in a vat in a brewery they would be considered a great deal like other extraneous matter. In other words, a brewery does not like some of that too much, does not like too much leaf and stem. If there is a high percentage of leaf and stem, that is not usable stuff.

Q. Leaves, stems and nubbins do not actually hurt the quality?

A. That is a very debatable point. From a brewer's standpoint, I [222] don't think the part that is left there—there isn't much of it left there in a pound of hops, for example.

Q. As far as leaves and stems are concerned, is it the custom in the trade to make an allowance for leaves and stem by adjusting the price?

A. Since we have had the marketing agreement and development of analyses for leaf and stem by

(Testimony of R. M. Walker.)

the Department of Agriculture, there has been a variation in price, one cent up or down from the breaking point of 8 per cent.

Q. Counsel asked you about your experience with your own crop and selling it and so on. Did you sell, under your contract, hops which had been discolored with mildew?

A. All of my crop was damaged to some extent in 1947, yes.

Q. Did that appear as discoloration on the bales?

A. Yes.

Q. Were there some nubbins in there?

A. Naturally would have to be.

Q. Were those hops, nevertheless, sold under prime quality contracts?

A. Well, they were sold. They were accepted under our agreement of settlement with them.

Q. Generally speaking, I think you said they were accepted at the contract price?

A. Well, yes, under the terms of the contract they were accepted, yes. [223]

Q. There has been a lot of talk about what prime quality means.

The Court: Is there, in the hop trade, any other form of contract? Just ask him that.

Q. (By Mr. Kester): Is there at the present time any contract used in the trade that does not call for prime quality hops?

A. None that I know of. I haven't seen one, if there is.

(Testimony of R. M. Walker.)

Q. In past years had it been customary to use other terms in designating the quality?

A. Oh, yes. Before, we used the term, what we call, choice and prime and mediums and so forth; but with the development of the hop marketing agreement and these analyses of hops, we have pretty much got away from that to some extent, and now when we speak of them—the newer group of buyers and also of growers—we talk of them as merchantable hops more than we do as choice and prime and so forth.

Q. In other words, a prime hop is a merchantable hop?

A. I would consider it so, yes.

Q. There has been some talk about future contracts. Would you say that a sale made on a contract for hops after the hops had been picked was a future contract?

A. I think any contract that calls for delivery of something at a later date would be a future contract, wouldn't it?

Q. I want to know.

A. That would be my interpretation of that, because you don't deliver at the time the contract is made; would be no occasion for [224] making the contract.

Mr. Kester: I think that is all.

Mr. Kerr: We would like to have marked this file of Hop Market Reviews. I understand Counsel has no objection.

(Testimony of R. M. Walker.)

Mr. Kester: No.

The Court: All right.

(File of Hop Market Review, United States Department of Agriculture, was thereupon received in evidence and marked Defendant's Exhibit No. 33.)

(Witness excused.) [225]

CASPER BECKER

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. State your name, please.

A. Casper Becker.

Q. Where do you live, Mr. Becker?

A. Gervais, Route 1.

Q. By whom are you employed?

A. Ralph E. Williams.

Q. What business is that?

A. Hop brokerage business.

Q. Was that firm formerly Williams & Hart?

A. Yes.

Q. Where is your office? Where do you operate?

A. We operate out of the Salem office, branch office.

(Testimony of Casper Becker.)

Q. What is your work with that firm, with Mr. Williams? A. I am a hop inspector.

Q. A hop inspector? A. Yes.

Q. How long have you been engaged in that business? A. Since 1945.

Q. How long have you been with Mr. Williams?

A. Practically all my life. [226]

Q. All the time? A. Yes.

Q. Were you in the hop business prior to becoming inspector?

A. I was foreman for Mr. Williams.

Q. Foreman, doing what?

A. Running the hop ranch.

Q. Running a hop ranch for him? A. Yes.

Q. So you have been experienced in growing hops as well as inspection? A. Yes.

Q. Did you have occasion to examine the 1947 crop of clusters of Mr. Geschwill's?

A. I did.

Q. What was the occasion for that?

The Court: Is this an expert witness?

Mr. Kester: I am not going to ask him with respect to quality.

The Court: What are you going to ask him about?

Mr. Kester: He is the gentleman who made the inspection and made the purchase for Williams & Hart at the time that these hops were sold to them.

The Court: All right.

(Testimony of Casper Becker.)

Q. (By Mr. Kester): What was the occasion for your making an inspection of the Geschwill 1947 clusters?

A. You mean as to the purchase of the hops?

Q. Why did you inspect them?

A. To see that they were running true to the type sample which was presented to me.

Q. Where did you get the type sample that you had? A. From Williams & Hart office.

Q. What was the purpose of your having a type sample?

A. To see that the hops run according to what the sample was.

Q. Had these hops been purchased or were they being purchased by Williams & Hart at that time?

A. Were they being purchased?

Q. Yes.

A. Well, according to the type sample I had they had already been. When I received the type sample, they had already been purchased.

Q. What was the purpose of your examination?

A. To see that the hops run uniform to the type sample, which they did.

Q. Did they run uniform to the type sample?

A. To the type sample I had, yes.

Q. How did you go about making that sort of inspection?

A. By tryings from each bale and also every tenth bale.

Q. By "tryings" you mean you would pull out

(Testimony of Casper Becker.)

with an instrument about a handful of hops out of each bale? A. True.

Q. Yes. And each bale sample was about a pound, was it? A. That is true. [228]

Q. Where did you make your examination?

A. Schwab's warehouse in Mt. Angel.

Q. Did you go through the entire 130 bales in that manner?

A. Only at separate times. There was a purchase of 40 bales at first, and then later there was a purchase of 90.

Q. 40 at one time and 90 at another?

A. Yes.

Q. Have you brought with you into the courtroom the sample which Williams & Hart had of those hops which you inspected at that time?

A. I have.

Q. These are packages with Sample No. 401.

A. Yes.

Q. Could you pick out from that lot the type sample, the one that you had to work from to see that the rest of the lot ran true to that?

A. Well, maybe not. Maybe there is more than one type sample that I did not receive.

Q. Could you step down and look over these and see if you can find the one or ones——

The Court: What is the point?

Mr. Kester: I think we would like to have it identified, your Honor.

(Testimony of Casper Becker.)

The Court: Let him identify it during the recess. Don't take the time to do it now. [229]

Mr. Kester: Very well.

The Court: And put it in evidence.

Q. (By Mr. Kester): Pursuant to that inspection were these hops purchased by Williams & Hart?

A. Yes.

Q. The entire 130 bales? A. Yes.

Mr. Kester: I think that is all.

(Type Sample of Geschwill hops was thereupon marked received in evidence as Plaintiff's Exhibit No. 31.)

Cross-Examination

By Mr. Kerr:

Q. Do you recall the date of the inspection?

A. No, I don't exactly. It was around April 1st, I believe.

Mr. Kerr: That is all.

(Witness excused.)

Mr. Kester: I am not too sure about your Honor's ruling on this matter of witnesses on quality.

The Court: No more expert witnesses.

Mr. Kester: Very well. Will Counsel stipulate that in the transaction involved in this case Mr. C. W. Paulus and his employees, Fry and Byers, were acting as agents of Hugo V. Loewi, [230] Inc.

The Court: I imagine he will.

Mr. Kerr: No, your Honor. I do not know what Counsel refers to.

Mr. Kester: Then I will ask Counsel to produce, so that we can have it marked and offer it in evidence, the contract between Loewi and Paulus.

The Court: Do you have that?

Mr. Kerr: We have that contract.

The Court: All right. Put it in.

(Executed copy of Agreement dated October 1, 1943, between Hugo V. Loewi, Inc., and Conrad W. Paulus, was thereupon received in evidence and marked Plaintiff's Exhibit No. 51.)

The Court: Do you rest now?

Mr. Kester: With this possible reservation: In case it develops that the pleadings should be amended to conform to the proof, may we discuss that at whatever time it becomes appropriate?

The Court: Certainly.

Mr. Kester: It is now understood that all documents which have been marked for the plaintiff are now in evidence?

The Court: Yes.

(Plaintiff rests.) [231]

Defendant's Testimony

LAMONT FRY

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, please.
A. Lamont Fry.
Q. Where do you live, Mr. Fry?
A. In Salem.
Q. What is your occupation?
A. I am a hop inspector.
Q. A hop inspector? A. Yes.
Q. By whom are you employed?
A. C. W. Paulus.
Q. How long have you been so employed?
A. Since the fall of 1943.
Q. Continuously during that time?
A. Yes.
Q. What is the business of Mr. Paulus?
A. Hop broker.
Q. What type of work do you do for Mr. Paulus?
A. Buying and inspecting.
Q. Has that been the nature of your work since you started this [232] work for him? A. Yes.
Q. Did you see the 1947 cluster hops of Mr. Geschwill, the plaintiff in this case, while they were on the vine? A. Yes.

(Testimony of Lamont Fry.)

Q. When?

A. Well, it was in the first part of August.

Q. Will you explain how you saw them?

A. Just a short distance, approximately 300 feet, to drive up to his hop house.

Q. What was the occasion for your being there?

A. Trying to buy his hops, trying to purchase his hops, talking to him about them.

Q. Did you take a sales slip or a form of sales slip out to Mr. Geschwill's residence in connection with the purchase of his 1947 crop of clusters?

A. Yes.

Q. Would you explain that occasion?

A. They made the deal in Mt. Angel on or about the 17th of August, and it was in the evening I went home and on my way home I stopped and had him sign the sales slip. He had agreed to sell the hops to us.

Q. What time of day was it?

A. This was at night, about 8:00 or 9:00 o'clock at night.

Q. Did you go out in the cluster yard at that time? [233] A. No.

Q. What, if any, conversation did you have with Mr. Geschwill at that time concerning his cluster hops?

A. Naturally, the conversation was how many bales he would have and to put on the sales slip in order to make the contract up.

Q. What was the purpose of that sales slip?

(Testimony of Lamont Fry.)

A. To determine the amount of money that was to be advance, and a description of his yards and such as that that goes on the contract.

Q. Did he estimate his 1947 cluster crop at that time?

A. He agreed that he would have around 20,000 pounds—he had twenty acres and averaged around five bales to the acre; that is what he felt he would have, so we came to an agreement.

Q. That was the estimate he gave you?

A. Yes, that is right.

Q. When was another time you were out to his place?

A. I don't recall the date, but it was in between the time of the contract and the time he had finished picking his lates.

Q. By "lates" you mean what?

A. Late clusters.

Q. Tell what you did at the time you were at his ranch on that occasion?

A. I went to the hop house, and he had some hops on the cooling room floor, and I went in on the cooling room floor and picked up some hops and took them to the light, and when he came there I just [234] made the remark—complimented him on his drying; he had done a nice job of drying.

Q. Describe to the Court the manner in which you looked at his hops.

A. "Yes," he said, "there is approximately ten bales of hops there." That is the way he explained

(Testimony of Lamont Fry.)

it. I picked up maybe four ounces of hops and carried them to the light and felt them and complimented him on the drying of his hops, and that was all the comment that was made.

Q. Were those fuggles or clusters?

A. I don't recall for sure which they were.

Q. Do you recall about the date of that?

A. No, I don't. It wasn't long after the contract was made, but I don't recall the date.

Q. Did you see any hops in bales at that time?

A. No.

Q. Did you go out into his cluster yard at that time? A. No.

Q. Did you take any samples of the Geschwill clusters in 1947? A. Yes.

Q. When was that?

A. Oh, about the 16th of September I think I took one or two samples.

Q. Where was it you took the samples?

A. Schwab's warehouse. [235]

Q. That is located where?

A. In Mt. Angel.

Q. How many samples did you take at that time?

A. I had a record showing I took two samples.

Q. You recall taking those samples, do you?

A. Yes.

Q. In what manner did you draw those samples?

A. With a knife and tong that we all carry and have.

(Testimony of Lamont Fry.)

Q. Will you explain to the Court the manner in which you took these samples?

A. Well, lay the bale down flatways and take your knife and cut the bale, make two different cuts about eight inches apart or six inches, rather, and then you have a tong about eight inches long and a handle which is about six or seven, and you put that in the bale and pull the sample out of the bale. That weighs approximately a pounds.

Q. Is that the method customarily used in the hop trade in sampling baled hops? A. Yes.

Q. Is that the method that you generally use in sampling baled hops? A. Yes.

Q. What did you do with the samples you then took of the Geschwill hops?

A. I took them to the office. [236]

Q. What office?

A. C. W. Paulus & Company.

Q. When was it you took them there with relation to the time you took them from the bale?

A. The same day, or that evening.

Q. What did you do with them in the office of C. W. Paulus?

A. We trimmed them; in other words, we kept about a fourth of it in the office and three-fourths of it we trimmed and rewrapped and sent East.

Q. Who do you mean by "we"?

A. Mr. Byers and Mr. Paulus and myself, the three of us.

(Testimony of Lamont Fry.)

Q. Did you personally do some of this wrapping of samples? A. Yes.

Q. Did you personally mail the samples to New York?

A. Well, I don't know if I personally mailed them. It would be one of the three of us.

Q. Were those samples marked in any way?

A. They have a lot number.

Q. Do you recall the lot number assigned to these samples? A. 79.

Q. How did you designate those early samples? Any particular way you marked them?

A. We just wrapped them and put the year and the amount of bales and the lot number on the sample.

Q. Those are not tryings, are they? [237]

A. No.

Q. Is there any other term that is used in describing that sample?

A. No. The samples we have, that we keep in the office, are called a type sample.

Q. Is that the term applied to that kind of a sample which you took, type sample?

A. Type sample, yes.

Q. Did you later take other samples of the Geschwill clusters?

A. Yes, I think on or about the 23rd.

Q. The 23rd of what month?

A. September.

Q. September? A. Yes.

(Testimony of Lamont Fry.)

Q. How many samples did you take then?

A. I believe it was three. I am not sure.

Q. Did you take those in the same manner as you took the previous two samples?

A. That is right.

Q. What did you do with those three samples?

A. I again took them to the office and rewrapped them and sent them East.

Q. What portion of those samples, of each of those three samples, did you send East?

A. Approximately three-quarters. [238]

Q. How large was the total sample from the bale?

A. About eight inches long by six inches wide and probably five inches thick.

Q. Weighing approximately how much?

A. Weighing approximately a pound or a pound and a quarter.

Q. Was Mr. Geschwill present when you took the first of the samples on the 16th of September?

A. Not to my knowledge.

Q. Was he present when you took the three samples at a later date?

A. Not to my knowledge.

Q. What was the occasion for your taking the samples on the 16th of September? Did anyone tell you to get them?

A. No. I just inquired if he had hops in the warehouse.

Q. Did anyone tell you to take the three samples

(Testimony of Lamont Fry.)

on the 24th of September, or whenever you took them later?

A. I think Mr. Paulus asked me to get extra samples out of that crop.

Q. Did you take any additional samples after these so-called type samples?

A. Not until the hops were graded in.

Q. Did you inspect and take samples of the hops at that time that you last referred to?

A. Yes.

Q. After taking the three type samples you have described, did you have any conversation with Mr. Geschwill concerning your grading [239] the hops?

A. No, I didn't personally; no.

Q. Were you present when he signed the letter of October 10th? Were you present when he signed a letter relating to the weighing and sampling of the cluster hops?

A. Yes, I handed it to him.

Q. Will you explain that occasion?

A. Well, Mr. Paulus told me that, if it was agreeable with Mr. Geschwill, I could go through and grade the hops and see what the rest of them looked like, and, in order to do that, I was told to have him sign a release, releasing us from any—well, anyway, that we had to take his hops, in other words. I filled that out and he signed it in Mt. Angel.

Q. What portion of it did you fill out?

A. I think just the date and two words.

Q. Do you recall what those two words were?

(Testimony of Lamont Fry.)

A. I think "Schwab's" and "Mt. Angel."

Q. That is the place where the inspection was going to be made? A. That is right.

Q. Did Mr. Paulus give you any instructions concerning getting him to sign that statement?

A. He told me to have him sign this, and then go ahead.

Q. What conversation, if any, did you have with Mr. Geschwill at the time that you met him, before he signed that statement?

A. Well, I explained the situation to him, that in order to go [240] through them he would have to sign this, and he agreed to it and signed it.

Q. What did he say?

A. Nothing, to my knowledge, if my memory serves me.

Q. I ask you to look at Defendant's Exhibit No. 32, now being handed to you, and ask you to state whether or not that is the statement signed by Mr. Geschwill to which you have referred?

A. It is.

Q. Does that refresh your memory as to the words you filled in on it?

A. Yes. It shows here "Schwab's" and "Mt. Angel." That is my handwriting.

Mr. Kerr: I offer that in evidence.

(Letter dated Salem, Oregon, October 10, 1947, signed by F. Geschwill, addressed to Hugo V. Loewi, Inc., Salem, Oregon, was thereupon

(Testimony of Lamont Fry.)

received in evidence and marked Defendant's Exhibit No. 32.)

Q. (By Mr. Kerr): After Mr. Geschwill signed that statement, Exhibit 32, I believe, did you then inspect the cluster hops of Mr. Geschwill?

A. Yes. I graded them.

Q. On what date?

A. That was October 10th.

Q. Was that before or after this letter, Exhibit 32, was signed? [241]

A. It was at the time, the same date.

Q. Was it before or after?

A. After the letter was signed.

Q. Was Mr. Geschwill present when you inspected the hops at Mt. Angel?

A. Most of the time, yes.

Q. Who else was present?

A. Well, I had Earl Weathers with me.

Q. Mr. Weathers was an employee of Mr. C. W. Paulus? A. He was at that time, yes.

Q. Is he now? A. No.

Q. Was he a full-time employee at that time?

A. No.

Q. Explain to the Court the procedure you followed in inspecting the Geschwill cluster hops on October 10th.

A. Well, had the hops all lined up; I tried each bale; in other words, took a handful of tryings out of the bale of hops and put it on top of the bale.

(Testimony of Lamont Fry.)

Q. How did you draw that trying from the bale?

A. With a trier, what we call it. A trier is about 18 inches long. After the tryings were drawn, I would look at them to see what the hops looked like and also smell them to see if the hops was dried properly and if there is any difference in color of the hops or in any way different than the majority of them. We found [242] approximately 25 bales in there that showed a little brighter in color than the rest of them; showed less mildew in them and——

Q. That was the tryings?

A. The tryings showed that. I drew Mr. Geschwill's attention. I told him we tried to grade them out. He wanted to sample them on the other side of the bale, and they were just like the majority of them, so we gave that up.

Q. What do you mean when you say you tried to grade them out?

A. Well, to show something else that looked a different color, the corner, end or whatever it might be, because the samples showed for themselves without trying them.

Q. How many bales were there?

A. 130 bales.

Q. Did you take tryings of each one of the 130 bales? A. Yes.

Q. Are those the tryings that you referred to as having been put on top of each bale?

(Testimony of Lamont Fry.)

A. Yes.

Q. Then did you thereafter sample the bales?

A. I thereafter sampled the bales, every tenth bale.

Q. Do you recall specifically what bales were sampled? A. Yes, 10, 20 and so on.

Q. In units of ten? A. That is right.

Q. Were the bales marked in any way? [243]

A. They were marked from 1 to 130.

Q. Is that the only marking on the bale?

A. No, they had the warehouse number and the state inspection number.

Q. Any other marks on the bale?

A. Not to my knowledge.

Q. Did you put any particular marks of C. W. Paulus on any bales?

A. No, just the number.

Q. Did you put any marking of Hugo V. Loewi on any of the bales? A. No, sir.

Q. Or did anyone else put any marks, other than these marks, on any of the bales? A. No.

Q. I wish you would explain to the Court how you drew from each tenth bale the sample that you refer to? What procedure did you follow in doing that?

A. The same procedure I followed in pulling the type sample earlier; in other words, I cut the bale with a knife, made two cuts, and then used the tongs and pulled the sample out, and then wrapped it up in paper.

(Testimony of Lamont Fry.)

Q. Did you mark the tenth-bale samples in any way?

A. No, only with the numbers 10, 20 and so on, on the head.

Q. Did you assign any other number to any of these packages of tenth-bale samples?

A. On the package I wrote what bale it was out of. [244]

Q. Did you indicate whether or not they were the Geschwill hops?

A. Yes, with Mr. Geschwill's name on them.

Q. You put Mr. Geschwill's name on each of the tenth-bale samples? A. That is right.

Q. Did you compare the tenth-bale samples with the tryings? A. Yes.

Q. How did you compare them?

A. Well, I—by taking them to the light and taking a handful of the sample and comparing it with a handful of the tryings on that particular bale.

Q. What was the purpose of comparing the tryings and the tenth-bale samples?

A. To see if they looked alike.

Q. If they had not looked alike, what would you have done?

A. Well, try them to grade the bales that showed a difference.

Q. What do you mean, you would grade them?

A. You see how many bales there was and then put them at the last or the first, whichever way you wanted to.

(Testimony of Lamont Fry.)

Q. Then you would set aside the ones that graded differently from the others?

A. Yes; put them on the last end of the line or the first end, whichever you desired.

Q. What was the purpose of that tenth-bale sampling?

A. Well, the tenth-bale sampling was to see if the inspection samples run like the tenth-bale samples. [245]

Q. Are those tenth-bale samples the same as to weight and dimensions as the type samples you referred to? A. Approximately, yes.

Q. Was Mr. Weathers with you at all times while you were then sampling or inspecting the Geschwill hops on October 10th? A. Yes.

Q. Was he merely in the same room or was he close to you?

A. He was close to me at all times.

Q. Was Mr. Geschwill with you at that time?

A. Most of the time, yes.

Q. Did you have any conversation with Mr. Geschwill concerning the hops on that occasion?

A. Other than telling him I noticed these and that we would try to grade them out if we could, and then explaining we couldn't do it, because they were false-packed.

Q. Will you explain the conversation as you recall it, relate the conversation. You are talking about false-packing.

A. I drew his attention that some of these hops

(Testimony of Lamont Fry.)

looked better than others and that we would try to grade them out. When we found it was impossible, then I so told him. I think that was all the conversation we had.

Q. Did he say anything to you when you told him it was impossible to grade them out?

A. No, nothing, to me. He knew it because he seen it.

Q. How did you determine that some of the hops looked differently [246] than others?

A. By looking at the tryings.

Q. You determined that from the tryings, is that right? A. Yes.

Q. When you noted that some of the tryings looked different from others, what did you do about it?

A. Well, I then sampled the bales to see if the whole bale was like that, and they didn't so we just opened most of them and found that they didn't, so just let it go.

Q. You say "they didn't." Didn't do what?

A. They didn't run according to the tryings.

Q. The tryings and the samples that you then took out differed, did they?

A. That is right.

Q. Were they all taken from the same bale?

A. All taken from the same bale, from the other side.

Q. They were not taken from the same side of the bale, is that right? A. That is right.

(Testimony of Lamont Fry.)

Q. What do you mean by "false-pack"?

A. Well, part of the hop bale being one color and part being another color.

Q. Is that a condition generally known in the trade as false-packing? A. Yes. [247]

Q. What is the cause of that condition? What would cause that condition?

A. Could be that part of his yard had a different color.

Q. Is there any other possible cause?

A. Well, yes, he could slack-dry them, or might be caused from wind whip or anything of that kind which would naturally show, in one part of his yard.

Q. Would improper mixing be a possible cause of that?

A. Well, if he had better ones that would be mixed in with his worst ones or vice versa.

Q. Then state whether or not false-packing may be the result of failure to thoroughly mix the hops.

A. That could be, yes.

Q. What did you do with the tryings?

A. I think they were thrown away after we got through with them.

Q. What did you do with the tenth-bale samples?

A. Took them to Salem, to Mr. Paulus' office.

Q. How many tenth-bale samples were there?

A. Thirteen.

Q. Do you know what was done with those after they reached Mr. Paulus' office?

(Testimony of Lamont Fry.)

A. Yes. From each sample three-quarters of it was kept out, trimmed and sent to New York.

Q. Did you participate or help in that trimming? A. I did. [248]

Q. By being sent to New York or to the East, what do you mean?

A. Well, sent to Hugo V. Loewi, Inc.

Q. While you were sampling and inspecting the Geschwill cluster hops at the warehouse on October 10th, did you see Mr. James Fournier?

A. I might have. I don't remember.

Q. You do not recall whether or not you saw him there at that time?

A. No, not in Schwab's. I might have seen him in Mt. Angel or around there.

Q. Did you at that time say to Mr. Geschwill that the hops looked "like some of the best hops I have sampled this year"? A. No.

Q. Did you make any similar statement?

A. No.

Q. Did you make any comment at all to Mr. Geschwill at that time concerning the appearance or quality of his cluster hops?

A. No, sir, none but what I just told you about, about grading the hops out.

Q. That is to say, you made no comment to Mr. Geschwill except that which you have just related concerning the tryings, is that right?

A. That is right.

(Testimony of Lamont Fry.)

Q. Do you recall ever making such a statement to Mr. Geschwill at any other time or place? [249]

A. No.

Q. The procedure which you have explained to the Court, which you used in taking the tenth-bale samples of the Geschwill cluster hops on October 10th, to your knowledge is that the procedure of sampling, taking tenth-bale samples, generally and customarily followed in the trade? A. Yes.

Q. Did you weigh in the hops at that time?

A. Yes.

Q. Did you at any time tell Mr. Geschwill you were accepting any of the late cluster hops?

A. No.

Q. Did you at any time tell Mr. Geschwill or anyone else you were accepting them?

A. No.

Q. Did you at any time tell Mr. Geschwill or anyone you had accepted them? A. No.

Q. Did you at any time tell Mr. Geschwill that they would be accepted by anyone? A. No.

Q. Or that any of them would be accepted by anyone? A. No.

Q. Was Mr. Geschwill in Mr. Paulus' office sometime after October 10th when you inspected and sampled the hops? [250]

A. Yes, I seen him there once, yes.

Q. When was that?

A. Well, I don't remember the date, but I was in the back room, in our small sample room, and Mr.

(Testimony of Lamont Fry.)

Paulus and Mr. Geschwill were looking at the samples.

Q. Those were samples of what?

A. The Geschwill late cluster hops. Mr. Paulus called me over. They were talking there. He called me over and asked me if I was able to grade the hops, the three samples that they had there, and I told him no, they were false-packed, and Mr. Geschwill agreed with that, and that was all there was said. I didn't talk to him any more.

Q. What did Mr. Geschwill say at that time?

A. As I recall, he said he agreed with me and that was all there was to it. I didn't have no conversation with him outside of that.

Q. He agreed with you about what?

A. That the hops were false-packed and he didn't think I could grade them out any better.

Q. What was talked about in referring to the false-packing of the hops?

A. These three samples showed a brighter color than the other ten, and we were trying to find out at the time how many bales would run that way, and that is what he was referring to. Mr. Paulus asked if I would be able to pick out how many bales would run to [251] his samples and I told him no, because they were false-packed, and Mr. Geschwill agreed with me.

Q. At the time you took the tenth-bale samples in the warehouse, on October 10th, did you note that these particular two or three samples were brighter in color than the others?

(Testimony of Lamont Fry.)

A. Well, these bales were mixed in among the other bales. They were left there and the hops were numbered from 1 up to the head, and we took tenth-bale samples and, consequently, three of them evidently—two or three I think—showed brighter.

Q. What did you do with these particular bales? Did you take any further samples from them?

A. No, just the tenth-bale samples as they came.

Q. Did you take any further tryings?

A. Yes, we did at the time, on the other side of the bales, to determine if they would run differently from the ones which we originally pulled.

Q. These second tryings, you say, showed the same as the other tryings? A. That is right.

Q. Those were all tenth-bale samples you were referring to in connection with the conversation with Mr. Geschwill in Mr. Paulus' office?

A. That is right.

Q. Do you recall who else was there at that time in Mr. Paulus' office? [252]

A. No, I don't recall.

Q. Was Mr. Paulus there?

A. Mr. Paulus and Mr. Geschwill.

Q. Do you recall whether or not Mr. Faulhaber was there?

A. Not to my knowledge. I didn't pay any attention. If he was there, I don't remember.

Q. Have you had occasion recently to deliver to Mr. Hoerner at Oregon State College one of the

(Testimony of Lamont Fry.)

samples which you took from the Geschwill late cluster hops? A. Yes.

Q. Was that one of the tenth-bale samples?

A. It was.

Q. Do you recall how that sample was marked?

A. It was marked, stamped on it, 79, Lot 79.

Q. What is that No. 79?

A. That is Mr. Geschwill's lot number.

Q. Are numbers assigned each grower, lot numbers? A. Yes.

Q. Then did you use that lot number on the bales of the growers when you sampled them?

A. Yes. Well, sometimes, when we inspect them or ship them or anything of that kind, we put that on there.

Q. Do the records which you made or kept concerning the inspection and weighing of the Geschwill late cluster hops show that lot number?

A. I don't know whether it does or not. [253]

Q. Do you recall when it was you delivered this sample to Mr. Hoerner?

A. I think it was Thursday or Friday last week.

Q. You delivered it to him where?

A. At Oregon State College.

Q. That was pursuant to whose instruction?

A. Mr. Paulus.

Mr. Kerr: That is all.

(Testimony of Lamont Fry.)

Cross-Examination

By Mr. Dougherty:

Q. I understand you were buying and inspecting for Mr. Paulus? A. Yes.

Q. You said you met this plaintiff, Mr. Geschwill, at Mt. Angel. Would you explain the circumstances of that?

A. It was on or about the 17th, I think. It was in Schwab's warehouse. I asked him if he wanted to sell his hops and he said yes, he would sell them, but he was going to give Williams & Hart the first chance, if they would pay the same amount of money. We had close contact with Mr. Hart at the time, or he did, I should say, and it was late in the afternoon when he finally contacted Mr. Hart, if I remember, and after he had talked to Mr. Hart he told me what he figured on. I called Mr. Paulus and he talked to him—Mr. Geschwill talked to Mr. Paulus and right after that he went home. We made the deal—it was agreed the price should be given to me and I, on the way home, or back to Salem, stopped by his house. It was after dark.

Q. Would you tell us the terms of the deal?

A. I think the contract shows it, but I think it was 85 cents.

Q. Was that 85 cents on both clusters and fuggles? A. Oh, yes, I am sure it was.

Q. Did it provide for any variation in price based on picking? A. I think it did.

(Testimony of Lamont Fry.)

Q. Did it provide for a premium based on seed content? A. I think so, yes.

Q. You went out to Mr. Geschwill's home and executed a sales slip, is that correct?

A. That is right.

Q. This sales slip, is that the type of sales slip used in making spot purchases?

A. That is right.

Q. What happened to that sales slip, if you know?

A. I don't know. I turned it over to Mr. Byers.

Q. Did you examine Mr. Geschwill's fuggle crop while they were being picked?

A. I think about August 12th that I stopped there and looked at them while they were being picked, yes.

Q. Did you always have free access to his hop-yard if you wanted to go into it?

A. Oh, yes. [255]

Q. Did you have free access to his hop house and warehouse, if you wanted to look at them?

A. Yes.

Q. You said you sent a split sample which you testified was sent East to Hugo V. Loewi, Inc. You said it was about three-quarters of the regular sample. Do I understand that this was cut down, however?

A. Was trimmed down on the ends and sides.

Q. That split sample which was sent to Loewi, would that weigh about a half-pound, roughly?

(Testimony of Lamont Fry.)

A. Yes, between a half and three-quarters, I would say.

Q. With reference to that paper you had Mr. Geschwill sign on October 10th, what was the purpose of having Mr. Geschwill sign such a paper?

A. Well, it was a release, to release us from any acceptance of the hops. It was just merely a paper so that we had an opportunity to go through the hops and inspect them and grade them and weigh them and mark them, and that it did not constitute an acceptance of the hops.

Q. Ordinarily, Mr. Fry, if you had done those acts without such a paper, would it have constituted an acceptance of the hops?

Mr. Kerr: That is calling for a legal conclusion.

The Court: He may answer that.

A. Some say it does; some say it doesn't. When we take in hops, that is the last thing we do. We are not accepting the hops by [256] weighing them, so it would be a difference of opinion.

Q. (By Mr. Dougherty): Ordinarily, the last thing that is done is to run them on the weighing scales? A. That is right.

Q. And you did weigh in these hops?

A. I did.

Q. When you inspected Mr. Geschwill's fuggle crop in the Schwab warehouse in Mt. Angel, did he at that time ask you to take in his clusters as well? A. Yes.

(Testimony of Lamont Fry.)

Q. Did you?

A. No, I didn't have any authority to touch them.

Q. Would you tell us what you said to Mr. Geschwill at that time.

A. I told him if it was all right with Mr. Paulus I would take his hops in. I told him if he wanted to he could call him, and I think he did call him, and when he came back he said he can't do anything about it, and it was not discussed any more.

Q. The cluster hops, were they then already in the Schwab warehouse?

A. Yes, I am sure they were.

Q. With respect to your inspection on or about October 10th, did you have the five split samples, so-called type samples?

A. I think I did, because I usually always take them.

Q. Those were splits of the five samples which you had previously sent to Hugo V. Loewi, Inc.?

A. That is correct.

Q. Did the 130-bale tryings, the samples which you took, did they run true to these type samples?

A. Well, as I explained before, about 25 or 30 bales looked a little brighter than the original sample.

Q. Some of them looked a little brighter?

A. Yes.

Q. The remainder, however, ran true to those type samples? A. That is true.

(Testimony of Lamont Fry.)

Q. Can you take tryings from any place on a bale? A. Yes.

Q. Do you ordinarily take them in different places on a bale? A. When we are suspicious.

Q. If you are not suspicious, what do you do?

A. Take one trying.

Q. What I am trying to get at is: Do you always take your tryings in the same relative place on each bale? A. Approximately.

Q. At that time and place, as I understand, the number was on the head of the bale? A. Yes.

Q. There was that warehouse number and then 130 bales?

A. There was the warehouse number and the state inspection number.

Q. So each bale carried the warehouse number and the state inspection number and then your number on the head, is that right? [258]

A. That is correct. It might not have been the warehouse number, but I think they had—that is a customary thing for them to put the warehouse number on.

Q. On the basis of your inspection would you say Mr. Geschwill's clusters were properly dried?

A. Yes.

Q. Would you say they were properly cured?

A. That means the same thing as drying.

Q. Would you say they were properly baled?

A. Yes.

Q. Did you at that time, Mr. Fry, have any

(Testimony of Lamont Fry.)

authority to either accept or reject the cluster crop you examined?

A. I had no authority to accept or reject.

Q. Did you set out any single bale or bales and reject those bales? A. No.

Mr. Dougherty: Thank you.

Redirect Examination

By Mr. Kerr:

Q. What did you do about these 25 or 30 bales you say looked a little brighter than the type samples? A. Do about them?

Q. Yes.

A. Didn't do anything. I left them where they were in the line. [259]

Q. Did you take any additional tryings out of them? A. Oh, yes.

Q. What did those additional tryings indicate?

A. They indicated they were false-packed and run like the original five samples.

Q. Those 25 or 30 bales, the ones you referred to before as having been false-packed?

A. Yes.

Q. The sample you said you took up to Mr. Hoerner at Corvallis, who selected that sample?

A. I don't know as it was selected. I just took it up—picked it out of the samples that were laying on the desk or table there.

Q. Did you pick it up yourself?

A. Yes, I picked it out myself.

(Testimony of Lamont Fry.)

Q. Was it one of the tenth-bale samples?

A. It was.

Mr. Kerr: That is all.

Recross-Examination

By Mr. Dougherty:

Q. You say that that was one of the tenth-bale samples that you took to Mr. Hoerner?

A. Yes.

Q. I understood you to say before you had sent the tenth-bale samples to Hugo V. Loewi, Inc., in the East? [260]

A. I did, but Hugo V. Loewi, Inc., sent them back to C. W. Paulus' office.

Q. Can you say of your own personal knowledge that the samples you received back from Hugo V. Loewi, Inc., were the tenth-bale samples you sent there? A. The paper was.

Q. Did you receive any written report on these samples of hops which you took over to Mr. Hoerner? A. I did not, no.

Q. Do you know if anyone else has received such a written report? A. Not to my knowledge.

Mr. Dougherty: Thank you.

(Witness excused.) [261]

ERNEST NETTER

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name.

A. Ernest Netter.

Q. Where do you live, Mr. Netter?

A. Salem.

Q. What is your occupation?

A. I am a hop inspector.

Q. By whom are you employed?

A. Williams & Hart—Ralph Williams, rather.

Q. Did you have occasion recently to take a sample of hops to Mr. Hoerner at Oregon State College at Corvallis? A. Yes, sir; I did.

Q. At whose direction did you take that sample to Mr. Hoerner? A. From Mr. Williams.

Q. Ralph Williams?

A. From Ralph Williams himself.

Q. That is Mr. Williams of Williams & Hart?

A. Yes.

Q. What sample did you take to Mr. Hoerner?

A. I took one of the original samples that we had.

Q. That is, one of the originals, of the samples there? [262]

A. Of the tenth-bale samples which Mr. Becker took at the time he received the hops.

(Testimony of Ernest Netter.)

Q. What hops were those? Were those the late cluster hops or the fuggles?

A. I believe they were late clusters.

Mr. Kester: At this point, your Honor, I think it would be proper to inquire what the purpose of this line of testimony is. I think we are entitled to know just what the purpose of this is. If there has been a report made, we are entitled to see it. We have asked Counsel whether or not there were any analyses made and we have been told there were not. I think we are entitled to know just what this is all leading up to.

Mr. Kerr: This is the foundation, your Honor, for testimony this afternoon by Mr. Hoerner himself. Samples of the Geschwill hops, the tenth-bale samples, in the possession of C. W. Paulus, were submitted to Mr. Hoerner, and also samples of the hops which Williams & Hart purchased from Geschwill were submitted to Mr. Hoerner, and Mr. Hoerner made a separation, an analysis or separation of these samples. That was in fact done this week, I believe.

The Court: The next time you had better have a pre-trial of your case. Don't hold back from each other. You haven't any report. Go ahead with this witness and let us see what it is all about. Go ahead with this witness.

Q. (By Mr. Kerr): Will you describe the sample you delivered to [263] Mr. Hoerner?

(Testimony of Ernest Netter.)

A. Describe the sample?

Q. Yes, describe the sample.

A. As has been said before, it was the usual tenth-bale sample; weighs approximately a pound or thereabouts.

Q. Did you personally take that sample from among the Geschwill samples in Williams & Hart's office? A. Yes.

Q. Where were those samples before?

A. Had them in the Salem office.

Q. How was the sample you delivered to Mr. Hoerner marked?

A. I don't recall, because I wasn't too familiar with the lot—I don't recall the lot number, but the usual sample has designated the lot number and the grower's name, Mr. Geschwill. It was a sample taken from a bundle of tenth-bale samples.

Q. Do you recall whether or not the lot number of Mr. Geschwill appeared on that sample?

A. Yes, the lot numbers appeared. I don't recall, though, what it was.

Q. Approximately what size sample did you deliver to Mr. Hoerner?

A. I believe it was a full-sized sample, the same as the samples you have before you, about a pound.

Q. Do you know whether or not that was one of the samples Mr. Becker had turned in to Williams & Hart's office? A. Yes, it was. [264]

Q. Did you have occasion to examine the sample itself before you took it to Mr. Hoerner?

(Testimony of Ernest Netter.)

A. I had access to the sample, but I had no occasion to examine it.

Mr. Kerr: That is all.

Mr. Dougherty: No further questions.

(Witness excused.)

Mr. Kerr: Does your Honor wish to start with another witness?

The Court: Yes. [265]

C. W. PAULUS

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. C. W. Paulus.

Q. Where do you reside?

A. At Salem, Oregon.

Q. What is your occupation?

A. Hop broker.

Q. How long have you been in that business?

A. On my own account since November, 1943, and, prior to that, in association with T. A. Livesley & Company since 1933.

Q. Do you buy hops for Hugo V. Loewi, Inc.?

A. Yes.

Q. Do you buy hops for other dealers?

(Testimony of C. W. Paulus.)

A. I have, on occasions, yes.

Q. Do you now grow any hops of your own?

A. No.

Q. Did you talk to Mr. Geschwill, the plaintiff in this case, with respect to the purchase of his cluster hops in 1947?

A. Not with respect to his cluster hops, no.

Q. Did you talk to him concerning the purchase of his fuggle hops? A. Yes. [266]

Q. When was that, for the first time?

A. On or about August 12th, on the occasion of a visit to the Mt. Angel Abbey College, the picking machine at Mt. Angel, where I first met Mr. Geschwill, for the first time, while they were picking his fuggle hops. I asked him if they were sold and told him we were interested in buying them if he wished to sell.

Q. What did Mr. Geschwill say at that time?

A. He said he was not ready to sell at that time.

Q. Did you see any of his fuggle hops at that time?

A. Yes. They were being picked at that time.

Q. What do you mean by being picked?

A. They were being harvested on the picking machine at the time of my visit.

Q. Who, if anyone, was with you at that time?

A. Mr. Oppenheim was with me at that time.

Q. Do you recall whether or not Mr. Oppenheim talked to Mr. Geschwill then?

A. No, sir; not to my knowledge.

(Testimony of C. W. Paulus.)

Q. Do you remember at any time going out to Mr. Geschwill's hopyard? A. No.

Q. Did you at any time advise Mr. Geschwill whether or not he should pick his cluster hops?

A. No, sir, I didn't.

Q. When was the next time you saw Mr. Geschwill, if you recall, [267] in 1947?

A. I can't recall the date, but it must have been in October sometime following the delivery and acceptance of his fuggle hops.

Q. Do you recall when his fuggle hops were accepted?

A. Sometime late in September; it must have been around the 22nd or 25th of September. The records will show it.

Q. That was 1947? A. 1947, yes.

Q. Did you have an occasion to discuss with Mr. Geschwill the matter of his execution of a statement relative to the sampling, inspecting and weighing of his late cluster hops?

A. No, I don't believe I discussed that with Mr. Geschwill.

Q. Did you instruct anyone of your employees to discuss that subject with him? A. Yes.

Q. Whom did you so instruct?

A. Lamont Fry.

Q. When was it you gave such instructions?

A. On or about October 10th.

Q. Can you relate to the Court what instructions you gave, what conversation you had with Mr. Fry?

(Testimony of C. W. Paulus.)

A. I advised Mr. Fry that we had been requested by Hugo V. Loewi, Inc., to inspect the Geschwill cluster lot of 130 bales, and to grade the same, without any authority to receive the lot, to take [268] tenth-bale samples and submit them to New York to the office of Hugo V. Loewi, Inc., following the inspection.

I gave Mr. Fry a letter which I had prepared for the signature of Mr. Geschwill which would authorize us to, first, inspect and grade each bale of his lot; second, take tenth-bale samples; and, third, to number the bales on the head of the bale and to weigh the bales; however, with the express stipulation and agreement on the part of Mr. Geschwill that none of these enumerated acts should be deemed or considered by him as an acceptance of his 1947 hop crop, either under an existing contract with Hugo V. Loewi or otherwise.

Q. Why did you give those instructions to Mr. Fry?

A. So that he might obtain from Mr. Geschwill his signature to this letter and his stipulation thereto.

Q. Who prepared the form of letter?

A. I prepared it.

Q. Did Mr. Fry return the signed letter to you?

A. Yes, he did.

Q. Do you recall when?

A. Following his return from Mt. Angel and after the inspection was made.

(Testimony of C. W. Paulus.)

Q. Is Exhibit 32 the letter you refer to?

A. Yes.

Mr. Kerr: I would like to have this letter of October 3rd handed to the witness. [269]

The Court: We will recess until 1:30.

(Thereupon a recess was taken until 1:30 o'clock p.m.)

(Court reconvened at 1:30 o'clock p.m., Wednesday, January 26, 1949.)

Direct Examination
(Continued)

By Mr. Kerr:

Q. Did you give Mr. Fry any instructions with respect to when to inspect the Geschwill hops in the warehouse? A. Yes.

Q. What were those instructions?

A. That he should obtain the signature of Mr. Geschwill to the letter which I gave him to deliver to Mr. Geschwill for his signature, and, following the signature to that letter, then to proceed to inspect, with the approval of Mr. Geschwill.

Q. Did you receive from Mr. Fry the inspection samples of the Geschwill clusters? A. Yes.

Q. What was the nature of those samples?

A. They were regular tenth-bale inspection samples.

Q. Did you also receive from Mr. Fry any other samples, other than the tenth-bale inspection samples?

(Testimony of C. W. Paulus.)

A. Other than the tenth-bale inspection samples?

Q. That is correct. A. No. [270]

Q. You did not receive any type samples?

A. He returned the type samples which he had taken with him in order to make the inspection, yes.

Q. Had those type samples been retained in your office? A. Yes.

Q. How did you keep the type samples and tenth-bale samples of hops taken from growers in your office?

A. They are all numbered and inscribed in a small book at the time they are received, and have the sample number with the number that we assign to the grower for each particular lot.

Q. Was a number assigned to Mr. Geschwill?

A. Pardon?

Q. Was a number assigned to Mr. Geschwill with respect to his clusters? A. Yes.

Q. What was that number? A. No. 79.

Q. Does that number appear on the samples that you have of the Geschwill 1947 clusters?

A. Yes.

Q. Is that number confined to the 1947 hop crop?

A. Yes.

Q. Did you, yourself, at any time inspect the Geschwill hops in the bale? A. No, I didn't.

Q. Did you receive any request from Mr. Geschwill concerning the time when you should inspect and grade the 1947 clusters? A. No.

(Testimony of C. W. Paulus.)

Q. Under what circumstances was it determined that the inspection would be made on the 10th?

A. Prior to the 10th of October—and I do not recall the date—a letter was written to Mr. Geschwill advising him that the original samples taken from the 130-bale lot did not meet the specifications of the contract and that a further inspection would be necessary.

Q. I hand you what has been marked Exhibit No. 4 and ask you to state whether or not that is the letter that you refer to? A. Yes, it is.

Q. Is that your signature on the letter?

A. Yes, it is.

Q. Did you have any communication with Mr. Geschwill after you had sent that letter to him with respect to taking any part of his cluster hops?

A. Not to my knowledge; not to my recollection.

Q. What was done with the samples of the Geschwill clusters that came to your office?

A. Which samples?

Q. Let's start with the first type samples. I have before me the Hop Sample Advice, dated September 16th, listing a number of samples which were forwarded to Hugo V. Loewi, Inc., New York City, by air [272] express as of that date and, enumerated among the samples, is listed one sample, Lot No. 79, representing 130 bales of 1947 crop of clusters grown by Fred Geschwill. What sample was that, if you remember?

(Testimony of C. W. Paulus.)

A. That was the first sample taken, one of the first samples taken from Mr. Geschwill's crop.

Q. What exhibit number are you referring to?

A. It is Plaintiff's Exhibit 12.

Q. Do you have a record of what was done with the other type samples?

A. Then, on the same date, September 16th, there was sent to Hugo V. Loewi, Inc., by express one sample of Lot 79, representing 130 bales of the Fred Geschwill 1947 clusters.

Q. You are referring now to what exhibit?

A. Plaintiff's Exhibit 11.

Q. What was the nature of the sample that you sent to Hugo V. Loewi, Inc., as indicated by those exhibits? Were they the entire type samples you received from Mr. Fry?

A. No, they were reduced somewhat in size and rewrapped, repackaged.

Q. What proportion of the entire sample was sent to New York?

A. In preparing a sample for shipment, approximately, I would say, two-thirds to three-quarters of the entire sample was used.

Q. Did you keep any portion of the sample in your office?

A. Yes; then a fourth or a third of the sample was retained as a type sample in our sample rack.

Q. Then was the type sample later sent to New York to Hugo V. [273] Loewi, Inc.?

(Testimony of C. W. Paulus.)

A. Yes, on September 23rd three samples of Lot 79 referred to, of the 130 bales of Fred Geschwill's 1947 clusters, were sent by airmail.

Q. What samples were those, if you remember?

A. Those were three additional samples drawn from the lot.

Q. Were those type samples or tenth-bale samples? A. Those were type samples.

Q. What proportion of the entire sample was thus sent?

A. The same as in the previous case.

Q. Did you retain a portion of the sample that was not sent to New York? A. Yes.

Q. What is that exhibit you are referring to? Plaintiff's Exhibit 13, is it not? A. Yes.

Q. Now, referring to Plaintiff's Exhibit 14, state whether or not the tenth-bale samples received from Mr. Fry were sent on to Hugo V. Loewi, Inc., of New York?

A. Yes. They were sent under date of October 11th by parcel post; thirteen samples of Lot 79, representing 130 bales of the Fred Geschwill 1947 cluster crop, were sent to Hugo V. Loewi, Inc.

Q. Were those the entire tenth-bale samples or the same proportion thereof as you previously indicated?

A. They were prepared in the same manner for shipment as previously stated. [274]

Q. Did you retain any portion of the tenth-bale samples in your office? A. Yes.

(Testimony of C. W. Paulus.)

Q. What relative proportion did you retain?

A. From a fourth to a third of the sample.

Q. So that each of the thirteen samples of the tenth-bale samples sent to Hugo V. Loewi in New York was approximately, you say, three-quarters of the entire tenth-bale sample? A. Yes.

Q. Did you receive back from New York any of the tenth-bale samples? A. Yes.

Q. Do you recall which ones?

A. All with the exception of Sample No. 90, I believe.

Q. You have those in court, the ones you received back from Hugo V. Loewi, Inc.?

A. Yes, and that No. 90 means Bale No. 90.

Q. Were any other samples, other than the type samples and tenth-bale samples which you have described to the Court, sent by your office to Hugo V. Loewi, Inc., in New York of the Geschwill hops?

A. Yes, samples of the fuggle hops.

Q. Do you recall how many samples, then, were sent to Hugo V. Loewi, Inc.?

A. There were two original splits, two original type samples of the fuggle lot sent to Hugo V. Loewi, Inc. [275]

Q. Were those later returned to you?

A. No, they were not.

Mr. Kerr: This letter has not been marked yet for identification. I would like to have it marked with the next number.

(Testimony of C. W. Paulus.)

(Letter dated September 15, 1947, Hugo V. Loewi, Inc., to C. W. Paulus, was thereupon received in evidence and marked Defendant's Exhibit No. 39.)

Q. (By Mr. Kerr): You are now being handed by the Bailiff what purports to be a letter which is now marked Exhibit 39. Will you state what that is.

A. This is a letter received by me and addressed to me from Hugo V. Loewi, Inc., dated September 15, 1947.

Mr. Kester: We have never seen this before. That is a document we have not seen. So far as I can tell, we have no particular objection to that or this other letter. I don't know what the particular purpose is or what purpose they have.

The Court: They are admitted anyway.

Mr. Kerr: I would like this letter assigned a number, too. It is my impression that these were both among the correspondence examined by Counsel.

The Court: That is admitted.

(Carbon copy of letter dated September 17, 1947, C. W. Paulus to Hugo V. Loewi, Inc., was thereupon received in evidence and marked Defendant's [276] Exhibit No. 40.)

Q. (By Mr. Kerr): The Bailiff is handing you what has been marked Defendant's Exhibit 40. Will you state what that is?

(Testimony of C. W. Paulus.)

A. This is a letter, a copy of a letter, which I addressed to Hugo V. Loewi, Inc., under date of September 17, 1947.

Q. Is that an office copy, to your knowledge, of that letter? A. Yes.

Q. Which you caused to be sent to Hugo V. Loewi, Inc., as indicated, on September 17, 1947?

A. Yes.

Mr. Kerr: It is my understanding all the exhibits which were identified in connection with the depositions are admitted in evidence.

The Court: Right.

Mr. Kester: That is one which we asked Counsel to produce. It was not produced and I would like a moment to read it.

The Court: Read it later. Go on to something else. Do you have a number of these documents?

Mr. Kerr: Yes, during the course of the deposition, your Honor——

The Court: Look at them during the recess. Look at the documents during the recess.

Q. (By Mr. Kerr): Mr. Paulus, did you deliver to Mr. Geschwill any of the samples of his 1947 cluster hops which were being kept in your office? [277] A. Yes.

Q. Will you explain to the Court the occasion of their delivery?

A. On the occasion that Mr. Geschwill visited the office, following the inspection of his cluster lot and the taking of tenth-bale samples, Mr. Gesch-

(Testimony of C. W. Paulus.)

will requested that he be given some of those samples, and I delivered to him three of the type samples of the tenth-bale inspection samples which we had in the office.

Q. Did you receive those samples back from Mr. Geschwill? A. No, I didn't.

Q. You do not have them now, is that correct?

A. No, I don't.

Q. Did Mr. Geschwill at that time explain to you why he wanted those samples?

A. My recollection is that he said he wanted to show them to some other dealer and perhaps arrange to dispose of the lot.

Q. Do you recall the date when he obtained those samples from you?

A. It was between the date of the inspection and October 30th.

Q. Were the only samples among those that you had of his hops that were delivered to him?

A. Yes.

Mr. Kerr: Will these be marked as exhibits?

Mr. Kester: We are willing that they go in.

The Court: Mark them at some other time. Just use your time asking questions. [278]

Q. (By Mr. Kerr): Did you on any occasion show to Mr. Geschwill any of the samples which were taken of his clusters, 1947 cluster hops?

A. Yes.

Q. On what occasion did that occur?

(Testimony of C. W. Paulus.)

A. On the occasion of the visit to our office following the inspection of his lot.

Q. The visit to whose office?

A. To my office.

Q. That is, a visit by Mr. Geschwill to your office, is that right? A. Yes.

Q. Do you recall the date?

A. I can't recall the date; sometime between October 15th and October 30th, but closer to October 15th.

Q. Will you describe what occurred at that time?

A. Mr. Geschwill came to the office and I advised him that I had received a letter from Hugo V. Loewi, Inc., indicating that Hugo V. Loewi, Inc., had reviewed the samples and that there were three samples in particular which they thought were better than the remaining ten samples, and that if we could find hops which would run up to those three samples they would consider accepting hops like those three samples on the contract.

I discussed that with Mr. Geschwill and reviewed the samples, and we agreed that it would be impossible to grade out [279] such hops following the inspection and following the information which I had obtained from Mr. Fry, who was also called in to consult with us.

Q. What was the information you received from Mr. Fry?

A. Information to the effect that, while samples

(Testimony of C. W. Paulus.)

taken from those three particular bales did show brighter than the rest of them, yet upon his re-inspection of those bales and other bales, inspection on the reverse side of the bale showed the same general characteristics as all of the rest of the hops in the lot and those bales which were marked as sample bales.

Q. Did you discuss that with Mr. Geschwill at that time in your office? A. Yes.

Q. What, if any, comment did Mr. Geschwill make on that subject?

A. He agreed and stated that he couldn't see any difference in those three bales as compared with the rest of them and if any particular bales were to be taken all of them should be taken.

Q. Was anyone with Mr. Geschwill when he came to your office on that date?

A. I don't recall whether Mr. Faulhaber was with him that day or not.

Q. Other than yourself and Mr. Geschwill, who was present, according to your recollection?

A. Mr. Fry was there, working in the sample room, and I called him over to discuss that phase with him. [280]

Q. Anyone else other than those you have mentioned? A. No.

Q. Did you have a conversation with Mr. Geschwill after the rejection of the hops by letter of October 30th? A. Yes.

Q. When?

(Testimony of C. W. Paulus.)

A. Shortly thereafter, by telephone and a personal visit, or personal visits to my office, by Mr. Geschwill.

Q. Do you recall the first time he telephoned you on the subject?

A. I believe I telephoned him, as a matter of fact.

Q. Do you recall when that was?

A. Must have been about October—rather, November 14th or 15th, when I telephoned him.

Q. What was the conversation at that time with Mr. Geschwill?

A. My conversation was directed towards an endeavor on my part to sell his hops. There had been another sale made of seedless hops in Salem and I thought I might interest this particular buyer in purchasing Mr. Geschwill's hops, and I asked him if he would sell them.

Q. What was Mr. Geschwill's response?

A. Mr. Geschwill said yes, he was interested in selling them.

Q. Were you discussing a possible sale to Hugo V. Loewi, Inc., at that time? A. No.

Q. Did Mr. Geschwill indicate any price at that time at which he [281] would sell?

A. Yes, we discussed a possible 80-cent price.

Q. Have you related the full conversation on that subject at that time?

A. Approximately. I advised him that Joe Hughes was in town and had bought some hops,

(Testimony of C. W. Paulus.)

and I asked him whether or not he would be interested to sell and he said yes.

Q. By "him" you mean Mr. Geschwill?

A. Yes.

Q. When was the next time you had any conversation with Mr. Geschwill relative to his rejected clusters?

A. I can't recall when, but Mr. Geschwill came to the office and inquired as to whether or not I might be able to obtain a sale of the hops, either through Hugo V. Loewi, Inc., or otherwise.

Q. Will you relate the nature of the conversation on that occasion.

A. Mr. Geschwill informed me that he wanted to dispose of his hops and I assured him I was wanting to do everything I could in my power to dispose of them for him, and also advised him I was taking the matter up with Hugo V. Loewi, Inc., as well as with other dealers to try and interest them in the purchase of his hops.

Q. Did you have any further conversation with Mr. Geschwill concerning the rejection of his clusters? A. Not that I recall; no, sir.

Q. Is Mr. Lamont Fry an employee of yours?

A. Yes.

Q. How long has he been in your employ?

A. Since November, 1943.

Q. Had you at any time authorized Mr. Fry to accept any of the 1947 Geschwill clusters?

A. No.

(Testimony of C. W. Paulus.)

Q. Did you at any time authorize any other person to accept those clusters? A. No.

Q. Did you accept them? A. No.

Q. Did you accept any portion of them?

A. No.

Q. I call your attention to Exhibit No. 1 and to the date of the recording of the cluster contract, and will ask you why that contract was recorded after the rejection of the hops.

A. This contract was recorded in Marion County on October 31, 1947, and was recorded as of that date due to a definite oversight. It is the practice of my office that we record all contracts and chattel mortgages very shortly after the contracts or mortgages have been signed. In this particular case the contract was not recorded, due to an oversight.

Q. Did you cause a sample of the Geschwill cluster hops, 1947 crop, to be delivered to Mr. Hoerner at Oregon State College at Corvallis?

A. Yes.

Q. Whom did you direct to deliver such sample to Mr. Hoerner? A. Lamont Fry.

Q. When did you so direct him?

A. I am not certain whether it was last Thursday or Friday of last week.

Q. What was the source of the sample that was given to Mr. Fry so to deliver?

A. It was one of the tenth-bale samples which we had received from Hugo V. Loewi, Inc., one of the original—pardon me—tenth-bale samples which

(Testimony of C. W. Paulus.)

had been sent to Hugo V. Loewi, Inc., and then returned by them to my office.

Q. Did Mr. Fry report to you that he had delived that sample to Mr. Hoerner? A. Yes.

Q. As far as you know, was that sample representative of all tenth-bale samples?

A. In my opinion it is.

Mr. Kerr: That is all on direct, your Honor.

Cross-Examination

By Mr. Dougherty:

Q. Why did you *sent* a sample of hops down to Mr. Hoerner?

A. I was requested so to do by Mr. Oppenheim of Hugo V. Loewi, Inc. [284]

Q. You said that sample was representative of all tenth-bale samples?

A. In my opinion it was.

Q. Did you examine all tenth-bale samples?

A. Yes.

Q. Then you selected this sample to send down, is that correct?

A. I wouldn't say I selected it; just chose one of them and it happened to be Sample 40.

Q. Did you have any similar analysis made at the time, in the fall of 1947? A. No.

Q. Did you have any similar analysis made with respect to any other hops in the fall of 1947?

A. No.

Q. Had you ever at any time had any similar analyses made with respect to any hops?

(Testimony of C. W. Paulus.)

A. No.

Q. I believe you testified you prepared the form of letter for Mr. Geschwill to sign to permit you to examine his 1947 cluster hops? A. I did.

Q. Where did the printed form, Exhibit No. 1, come from? Where did that printed form of contract come from?

A. I don't recall who printed it, Mr. Dougherty. It is a form that we use in our office. [285]

Q. It came from your office? A. Yes.

Q. The sales slip about which Mr. Fry testified—were you in court when he testified?

A. Yes.

Q. The sales slip about which he testified, where did that form come from?

A. From our office.

Q. What happened to that sales slip?

A. I think it was destroyed in the normal course of procedure. The sales slip contained information for the office to prepare the contract from the data, relative to the contract—a description of the property where the hops are grown, the price, or specifications of price, and then the signature of the grower thereon. If he acknowledges the contract, the deal having been entered into, those are usually not maintained.

Q. Is that the type of sales slip you use on spot purchases? A. I believe so.

Q. The mimeographed rider attached to the

(Testimony of C. W. Paulus.)

printed form of contract, Exhibit No. 1, who prepared that mimeographed rider?

A. That was prepared in my office.

Q. Did you at any time examine Mr. Geschwill's 1947 fuggles while they were being picked?

A. No, I did not.

Q. You did not? [286]

A. I beg your pardon. I will restate that. Yes, I did. I saw the fuggles being picked by the Mt. Angel picking machine.

Q. Did Mr. Oppenheim also see them?

A. I rather think he did. He was there with me at the time.

Q. Did you at that time approach Mr. Geschwill concerning the sale of his hops?

A. I spoke to him about the same of his fuggle hops, yes.

Q. Did you at any time ever inspect Mr. Geschwill's hopyard? A. No, I have not.

Q. Did you have that authority, at any time to go into his hopyard?

A. Yes, I thought so.

Q. I believe you testified you did not inspect his clusters in the warehouse, is that correct?

A. That is right.

Q. Did you have that authority, to inspect his clusters in the warehouse at any time?

A. Yes, sir; I did.

Q. You did, however, I believe, inspect the tenth-bale samples and the type samples?

(Testimony of C. W. Paulus.)

A. That is right.

Q. Did you, on or about August 17th, authorize Mr. Fry to negotiate the hop purchase with Mr. Geschwill? A. Yes.

Q. Will you tell us the circumstances? [287]

A. I received an order from Hugo V. Loewi to buy fuggle and cluster hops even prior to that date, and, having talked to Mr. Geschwill previously about the possibility of a purchase of his fuggle hops, Mr. Fry saw Mr. Geschwill. Negotiations were made between Mr. Fry and Mr. Geschwill and the purchase was consummated.

Q. Did Mr. Geschwill speak to you on the telephone? A. Yes.

Q. What was the nature of the deal? Was there a floor price on the hops?

A. Yes. The contract negotiated was predicated upon a floor price to be mentioned and the grower given the right of selecting the market price at some later date.

Q. What was that floor price?

A. If I recall, it was 85 cents.

Q. Was that on both fuggles and lates?

A. I would have to refer to the contracts. I have not seen them for some time.

Q. Was there to be a variation according to the leaf-and-stem content? A. Yes.

Q. Who makes that leaf-and-stem content analysis?

(Testimony of C. W. Paulus.)

A. The Oregon State Department of Agriculture.

Q. Was there to be a variation in price according to the seed content? [288] A. Yes.

Q. With a premium for a low seed content?

A. That is right.

Q. You say that you had instructions or orders from Mr. Oppenheim of Hugo V. Loewi, Inc., to purchase hops. A. Yes.

Q. Was there a stated amount you were to purchase?

A. I cannot recall now. That was obtained in the usual course of business by hops. I don't know whether I had an order for five hundred or a thousand or fifteen hundred bales at that time.

Q. But at that time you were buying them for Loewi's account? A. That is right.

Q. You were buying for Loewi's account a considerable amount of hops? A. That is right.

Q. Do you know or recall when Mr. Geschwill picked his hops, where he took his fuggles and clusters in 1947? Did he take them to Schwab's warehouse in Mt. Angel? A. Yes.

Q. Was that warehouse acceptable to you and to Loewi?

A. Yes. A lot of hops are delivered to Schwab's warehouse.

Q. So the time that he took his fuggles and clusters there was acceptable to you and Hugo V. Loewi, Inc.? A. As far as I know, yes.

(Testimony of C. W. Paulus.)

Q. Was any objection ever made as to the time or place? [289]

A. Not to my knowledge.

Q. With reference to Exhibits 7 and 9, did Mr. Geschwill select the grower's market price on or about September 17, 1947, of 85 cents under the cluster contract here? A. Yes, he did.

Q. Was that the grower's market price at that time? A. Yes.

Q. I notice that Exhibit 7 has not been signed for Hugo V. Loewi, Inc. Why is that?

A. Since it was not accepted by Hugo V. Loewi, Inc., or by me as agent, since the hops had not been accepted.

Q. The price was not accepted by Hugo V. Loewi, Inc., is that correct?

A. I wouldn't say that. The hops had not been accepted.

Q. But that was the grower's market price at that time? A. Yes, that is right.

Q. I believe you testified that on or about September 16th you sent one split-type sample to Hugo V. Loewi, Inc., by air express and another split-type sample to Hugo V. Loewi, Inc., by ordinary express. Is that correct?

A. Either the 15th or 16th of September. I have forgotten.

Q. Do you consider one or two such samples from a lot of 130 bales was enough for the buyer to draw conclusions concerning the whole lot?

(Testimony of C. W. Paulus.)

A. Well, that is difficult to answer. In the mind of the buyer, [290] if he sees a sample from that lot, he may say to himself that should the entire lot run like this sample they are not acceptable to him.

Q. Do I understand that one or two such samples will not fully represent 130 bales?

A. I didn't say that. In direct answer to your question, I would say that final inspection samples are taken which are representative of the entire lot, which were the tenth-bale samples subsequently taken from Mr. Geschwill's lot.

Q. Would you say that this is a true statement: Two samples are hardly enough samples to draw from a lot to more or less represent it, for the buyer to draw conclusions on?

A. That may be. On the other hand, the buyer could also make up his mind that on the basis of the samples before him the entire lot might not be acceptable, should the entire lot later run to that sample.

I will directly answer you, Mr. Dougherty, that it is my own personal opinion that one sample from a 130-bale lot might not be representative. On the other hand, it could be. In the Geschwill case it was.

Q. Mr. Paulus, do you recollect having your deposition under oath taken on or about Friday, January 14th, this year? A. Yes.

Mr. Dougherty: Page 37, Counsel.

Q. Do you recollect this, Mr. Paulus: [291]

(Testimony of C. W. Paulus.)

"Q. Can you say why additional samples were sent on or about September 23rd?"

And your answer was——

Mr. Kerr: Page 27?

Mr. Dougherty: Reading from the bottom of Page 36 and the top of Page 37.

"A. It is my recollection that when the original samples were taken the crop had not been entirely baled. At any rate, only two samples were taken at that time by Mr. Fry, and two samples is hardly enough samples to draw from a lot to more or less represent it, for the buyer to draw conclusions.

"So when all the hops were in the warehouse, three additional samples were drawn September 23rd. Now, I may not be absolutely correct in that. All of the hops might have been in the warehouse September 16th, but that is the way it occurs to me."

Do you recollect that? A. Yes.

Q. Is that your testimony at this time?

A. Yes, sir.

Q. Before the sample went air express and before the sample went by ordinary express, did Hugo V. Loewi, Inc., advise you concerning those hops?

A. Yes. [292]

Q. Did they at that time advise you that those hops were of fair quality?

A. I think the contrary was the case.

Q. For the purpose of refreshing your memory, I would like to invite your attention to Exhibit No. 20.

(Testimony of C. W. Paulus.)

A. This telegram is dated September 18, 1947, and is addressed to me and signed by Hugo V. Loewi, Inc., and, with reference to the Geschwill case, this telegram states as follows: "Referring Sample 79, these hops fair quality but not prime delivery. At what price can you settle with grower?"

Q. In other words, then, Hugo V. Loewi, Inc., was concerned about the price of the hops, is that correct? A. They may have been.

Q. Prior to the telegram of September 18, 1947, you had advised Hugo V. Loewi, Inc., had you not, that Mr. Geschwill had selected the grower's market price of 85? A. Yes.

Q. So, at the time they sent the telegram of September 18th they knew what price he had selected?

A. I am not definitely certain. I am certain that I advised Hugo V. Loewi, Inc., by telegram of the price selection by Mr. Geschwill. Whether or not they might have received my telegram prior to the time that this telegram was sent I am not in a position to say, but I think the record will show that or, rather, the file will show that. [293]

Q. May I now invite your attention to Plaintiff's Exhibit 18, for the purpose of refreshing your memory?

A. This is an office copy of a night letter telegram dated September 17th, addressed by me to Hugo V. Loewi, Inc., New York City, and states,

(Testimony of C. W. Paulus.)

with reference to the Geschwill matter, as follows: "Sample 79 Geschwill selects 85-cent price on 130 bales clusters eight leaf one seeds basis eight per cent leaf with seedless premium."

This was sent night letter. This telegram was received the next morning, and I don't know whether it was sent night letter or day letter the next morning.

Q. In any event, they had received one or two with splits?

A. Correct. Yes, I am quite certain they did.

Q. Did you discuss with Mr. Geschwill the matter of a reduction in price from the agreed contract price?

A. I don't believe I did at this particular time.

Q. Just for the purpose of refreshing your recollection, with reference to this same deposition that we spoke of before, reading from Page 49, do you recall that this question was put and answered by you, referring to the telegram of September 18th:

"Q. Did you communicate that to Mr. Geschwill?

"A. Yes, we discussed price at or about that time or following that."

A. It might have been at or about that, or following. I said I didn't recall that particularly at this time. [294]

Q. But you did discuss the matter of reduction in price with Mr. Geschwill? A. Yes.

Q. What did Mr. Geschwill say?

(Testimony of C. W. Paulus.)

A. He was not inclined to accept any reduction in price.

Q. Did you so advise your principal?

A. Yes, I believe I did.

Q. I believe that about that time you had a telephone conversation with Mr. Oppenheim concerning the Geschwill cluster hops?

A. I may have had. I don't know. To what particular matter do you refer?

Q. Concerning the price of the Geschwill 1947 clusters?

A. Particularly in reference to what?

Q. Concerning the price.

A. To what particular conversation do you refer, and when?

Q. I am asking you whether or not you had a telephone conversation concerning this matter, within a few days after September 18, 1947, in which telephone conversation you discussed with Mr. Oppenheim the price on the Geschwill 1947 clusters?

A. If I so testified in the deposition that I gave. I don't know what the background was. I can't recall it now. I had many conversations with Mr. Oppenheim on the telephone, and I may or may not have discussed that situation with him. I probably did.

Q. Thereafter did Mr. Oppenheim of Hugo V. Loewi, Inc., express dissatisfaction with the sample they had seen? [295]

(Testimony of C. W. Paulus.)

A. Yes, I think so.

Q. And at the time they decided they were not proper quality but were badly blighted they knew Mr. Geschwill wanted the agreed contract price, is that correct? A. Yes.

Q. And that he did not think he should take a reduced price, is that correct?

A. At that time.

Q. Yes. On or about September 25th did you have a telephone conversation with Mr. Geschwill about taking in his 1947 clusters? A. Yes.

Q. What was the purport or content of that conversation?

A. He had someone else call me and then Fred came on the telephone and asked why we could not receive his cluster hops at the same time we received his fuggle hops, and I advised him then I had no authority from Hugo V. Loewi, Inc., to accept and receive his cluster hops at that time.

Q. Do I understand that you had no authority from Hugo V. Loewi, Inc., to either accept or reject Mr. Geschwill's 1947 clusters? A. Yes.

Q. You did not have authority?

A. I did not have authority.

Q. To your knowledge, did anyone who represented Hugo V. Loewi, Inc., or who represented yourself, and who had such authority, did any such person ever inspect Mr. Geschwill's 1947 clusters in [296] the bales? A. Repeat that.

Q. Did anyone who had any authority to either

(Testimony of C. W. Paulus.)

accept or reject the 1947 clusters, did any such person ever inspect those hops, in the bales?

A. Neither I nor Mr. Fry, who made the inspection of the lot at my direction, had authority to accept the lot. I, however, had authority to reject the lot upon advice from Hugo V. Loewi, Inc.

Q. Did your instructions with respect to acceptance or rejection come from the Loewi corporation?

A. Yes.

Q. You had no authority to act on the matter on your own initiative or in your own judgment?

A. No, pending submission of the tenth-bale samples and description of the lot and how the lot was inspected, to Hugo V. Loewi, Inc.

Q. These three additional samples that you sent, on or about September 23rd, to the Loewi corporation, did they request those samples?

A. I can't recall whether they did or not. I wished to submit additional samples on the Geschwill lot to the Hugo V. Loewi corporation.

Q. Did you send those samples to the Loewi corporation because you thought the original two samples were not adequate?

A. I rather thought so, yes. That is what was in my mind. I [297] wouldn't say "adequate" but that further samples were necessary to submit.

Q. Did the Loewi corporation thereafter instruct you to take a full line of tenth-bale samples and send them in?

(Testimony of C. W. Paulus.)

A. Yes, they requested that the lot be inspected and tenth-bale samples be submitted to them for their decision.

Q. As I understand it, first they decided that they were of fair quality; then, when they could not get a reduction in price, they decided they were badly blighted. Did they still at this time, on or about September 30th, consider that they were badly blighted? A. On September 30th?

Q. Yes. A. Well——

Q. For the purpose of refreshing your memory, may I invite your attention to Exhibit 17?

A. This is a letter dated September 30, 1947, addressed to me and signed Hugo V. Loewi, Inc., and it states:

"As per our wire of September 25th in reference to Lot 79, 130 bales of the Geschwill crop, upon examination of the samples we find that they are badly blighted.

"We cannot accept such hops as a prime delivery, and suggest that you inspect and grade these hops, and send us tenth-bale samples representing all grades for our final decision."

Q. And, as I understand it, you caused tenth-bale samples to be [298] taken and forwarded, is that correct? A. Yes.

Q. What did Hugo V. Loewi, Inc., have to say about the tenth-bale samples?

A. You have the file before you, Mr. Dougherty.

(Testimony of C. W. Paulus.)

Q. For the purpose of refreshing your memory, may I invite your attention to Exhibits 26 and 23.

A. Have you directed a question to me?

Q. Yes.

(Question read.)

A. I have before me Exhibit 26, which is a telegram dated October 21, 1947, addressed to me, signed by Hugo V. Loewi, Inc., reading as follows:

"Received thirteen samples Lot 79 Geschwill crop. All samples show many blighted hops but samples of Bales 70, 100 and 130 decidedly better than other samples. Willing accept any bales recently free of blighted hops and equal to these three samples. Reject balance account not being prime delivery."

That was confirmed by a letter of the same date, namely, October 21, 1947, which is Exhibit 23, addressed to me and signed by Hugo V. Loewi, Inc., reading as follows:

"Confirming wire to you today in reference to the tenth-bale samples of Lot 79, Geschwill seedless, we have gone through these samples very carefully. [299]

"We find that all of them show many blighted burrs and the quality of none of the hops is prime. However, we find that samples of Bales 70, 100 and 130 are decidedly better quality than the other ten samples. We are satisfied to accept delivery of any hops which run no worse than these three samples, provided they do not show more blighted burrs, but

(Testimony of C. W. Paulus.)

we certainly cannot accept any hops in the lot which run poorer.

"We therefore instruct you to either arrange with the grower to re-inspect the hops and take delivery of those like the three samples, or to reject the entire lot and demand refund of our advances."

Q. Do I understand, then, Mr. Paulus, that Hugo V. Loewi, Inc. was satisfied to take delivery of all hops which ran no worse than the samples of Bales 70, 100 and 130?

A. That is what they stated.

Q. Did you thereafter examine the samples, Mr. Paulus? A. Thereafter and prior thereto.

Q. Did you find any samples which ran worse than samples of Bales 70, 100 and 130?

A. As a matter of fact, on the type samples, those samples looked just a little brighter and had a little more luster, but when you would break the samples, when you would turn them over, you would find them the same type as all the rest of them.

Q. As a matter of fact, was it not difficult to discern any [300] difference as between all thirteen samples?

A. Well, after Mr. Fry, my inspector, and I had been reviewing those three samples, then we could see just a little more brightness, a little more luster perhaps in those three, on the face.

However, as I stated in my answer to the previous question, in my previous answer, when you broke the samples and looked at them they were the

(Testimony of C. W. Paulus.)

same throughout. Moreover, Mr. Fry had already re-inspected those particular bales that did show a little more brightness on one side and found in a bunch of bales on the other side the same type of hop running through.

Q. But, as I understand it, all thirteen samples were substantially the same. This little difference in brightness was not a material difference, is that correct?

A. In my opinion, that is correct.

Q. Therefore, pursuant to instructions, did you write Mr. Geschwill a letter of rejection on or about October 30th?

A. Thereafter and following the discussion with Mr. Geschwill on the subject about which I previously testified, I wrote the letter of rejection on October 30th, yes.

Q. Did you thereafter cause the cluster contract to be recorded as a chattel mortgage?

A. I did, yes.

Q. Did you thereafter attempt to negotiate the sale of Mr. Geschwill's cluster hops either to Loewi or somebody else? A. Yes. [301]

Q. Did you attempt to effect a settlement between Mr. Geschwill and Hugo V. Loewi, Inc., your principal?

A. Mr. Geschwill asked if Loewi might not take the hops—buy the hops at a reduction in price, which matter was referred to Hugo V. Loewi, Inc., by letter at a subsequent date.

(Testimony of C. W. Paulus.)

Q. Was Hugo V. Loewi, Inc., interested in Mr. Geschwill's compromise suggestion?

A. No, they were not.

Q. Did Hugo V. Loewi, Inc., suggest that Mr. Geschwill attempt to interest other buyers in the hops?

A. They may have. I don't recall. You may have the telegram or letter before you.

Mr. Dougherty: These are some that have not yet been marked. May I refer to them and have them marked during the recess?

The Court: Let the letters speak for themselves. You are dragging it out too much. You are covering a lot of things that are not in dispute.

Q. (By Mr. Dougherty): In 1947, Mr. Paulus, did you deal in anything except prime hops? By that I mean were all of your contracts prime hops?

A. Yes.

Q. Did you have any contracts for choice or medium hops?

A. Never have taken any contracts for choice or medium hops.

Q. In reference to your examination of the samples of the Geschwill 1947 clusters, would you say they were properly handled? [302]

A. Yes.

Q. Properly dried? A. Yes.

Q. Cured? A. That is synonymous; yes.

Q. Baled? A. Yes.

(Testimony of C. W. Paulus.)

Q. Could you say that they were not the product of the first year's planting? A. Yes.

Q. Would you say they were not affected by sprays or dusting? A. Not to my observation.

Q. Would you say they were free from damage by vermin? A. As far as I saw, yes.

Q. Would you say that they were in sound condition with respect to drying, curing, handling, keeping qualities and so on? A. Yes.

Q. What was the range of 1947 cluster prices in the spring of 1948? A. When?

Q. Prices to growers in Oregon?

A. On 1947 hops?

Q. Yes.

A. Irrespective, now, of grade or quality, from January 1st to about May, I would say, 50 cents to 20 cents. [303]

Mr. Dougherty: Thank you.

Redirect Examination

By Mr. Kerr:

Q. What do you mean by that term, irrespective of quality?

A. That those prices may or may not have been for prime hops.

Q. These prices you are referring to are on spot sales, are they not? A. On spot sales.

Q. Are spot sales made on the basis of samples, to your knowledge? A. All of them.

(Testimony of C. W. Paulus.)

Q. Never made on anything but on samples, is that right? A. No.

Q. You mean they are or not?

A. They are not made only on—but on samples; always made on the basis of samples.

Q. Do you know whether or not there was any appreciable quantity of 1947 prime quality cluster hops on the market after January 1, 1948?

A. As far as I know, no.

Q. You mean as far as you know there were no such hops on the market?

A. I wouldn't say there were no hops, no prime quality hops remaining for the market, but in my opinion there were very few if any.

Q. You are a buyer of hops, are you not, from growers? [304] A. Yes.

Q. Your business as a broker is not in selling but, rather, buying hops from growers for dealers?

A. Yes.

Q. Your profit consists of the commission that you get from the dealer on the hops you buy from the growers, is that correct? A. Yes.

Q. Then does it follow that the more hops you are able to persuade the dealer to accept from the grower the greater your commission?

A. That is correct.

Q. Would you say your interest definitely is in persuading the dealer to accept hops from the grower? A. Yes, it is.

(Testimony of C. W. Paulus.)

Q. You have in your hand Exhibit 39 and 40.

A. Do I have them?

Q. Yes. A. No, I don't.

Q. What exhibits do you have in your hand?

A. I have 26 and this one, Plaintiff's Exhibit 23. This is Exhibit 26.

Q. You said when you broke open the samples of Bales 30, 130 and 90, I believe—no, 70——

Will you state the bale numbers of the three samples that you testified you broke open? [305]

A. 70, 100 and 130, which are referred to in these two exhibits.

Q. When you broke those open you stated you found that they showed the same throughout. What do you mean by that?

A. The same general characteristics throughout.

Q. The same as what?

A. The same as the other samples showed; namely, they disclosed a quantity of mildewed burrs, and the same general characteristics of the hops.

Q. When you said they showed the same throughout, you meant the same as the other samples, is that right? A. Yes.

Q. Counsel asked you to state the range of cluster hops, 1947 cluster prices to growers in Oregon after January 1, 1948. Do you know what the range was of market prices on 1947 late cluster hops in Oregon prior to January 1, 1948?

A. Yes, the market continued strong throughout the latter half of August and through to the end

(Testimony of C. W. Paulus.)

of November, along about the 20th of November, at a price of 85 cents for clusters and 90 cents for fuggles, for eight percent picking, eight percent leaf and stem.

Q. What was the trend of the market or reaction of the market in December, 1947?

A. There was not too much buying, but the market continued strong for good qualities, if they were available.

Q. The Bailiff will hand to you Defendant's Exhibit No. 33, which is a sheaf of Hop Market Review Reports. [306]

I ask you to refer specifically to the report for November 17, 1947, and state whether or not in your opinion that report relative to the market price of Oregon hops is correct.

A. That is my opinion of the situation that existed relative to hop prices during that period, yes.

Q. And what is your judgment as to whether or not the statement in that report relative to the stock of good quality hops then on hand in the hands of growers is correct?

A. You mean with reference to the total crop harvested?

Q. No. I am referring to the hop market report for December 22, 1947. State whether or not you agree with that statement. A. Yes.

Q. The statement there concerning the market price prevailing for Oregon hops?

(Testimony of C. W. Paulus.)

A. Yes, I think that is a statement of fact.

Q. Do you agree with the statement that appears in that report relative to the stock of good quality hops on hand in the growers' hands?

A. Yes.

Q. Specifically, what is that statement?

A. "Prices for good quality hops have held steady but trading has been light."

Also, "Offerings of 1947 crop have been light as supplies in the growers' hands were limited since the larger part of [307] the crop had been sold earlier in the season."

Q. Referring again to the report of November 17th, do you find there a report or reference concerning the stock of prime quality, good quality hops in the growers' hands?

A. The report states: "The hop market in Oregon held very firm with an active demand for good quality hops during the first two weeks in November. Prices generally quoted to growers were 85 cents per pound for regular seeded clusters, 90 cents for semi-seedless and fuggles and 95 cents per pound for seedless, with the usual contract terms, which about equal the high points of the season."

Q. Will you refer to the last report for October, 1947. Do you agree with the report as of that date, October 27, 1947: "The hop market in Oregon——" and so on? Do you agree with the report on the prevailing market prices in hops? — for Oregon hops? A. Yes.

(Testimony of C. W. Paulus.)

Q. What is that statement, specifically?

A. "The hop market in Oregon has held steady with no change in prices during the period under consideration. Some trading has been reported during the last two weeks, but the total volume is not definitely known—possibly around 2,000 to 2,500 bales, with one rather large lot and a number of smaller lots known to have passed out of the hands of the growers during the period."

"Prices generally quoted were reported to have been on about the same bases as have prevailed during other recent weeks [308] of 85 cents per pound for seeded hop with not more than eight per cent leaf and stem; semi-seedless at 90 cents and seedless at 95 cents per pound with not over six per cent leaf and stem; clusters were also 90 cents per pound with usual premiums and a discount."

Q. Is it your judgment that the report is accurate in the particulars you have read?

A. Yes.

Mr. Kerr: We will have the tenth-bale samples to be testified to later and, with the understanding we may recall the witness for that purpose, I have no further questions at this time.

Recross-Examination

By Mr. Dougherty:

Q. Were these sales you have been speaking of

(Testimony of C. W. Paulus.)

on open-end contracts, or were they spot sales of hops that had previously not been contracted?

A. Both; they were spot sales as well as contract sales.

Q. It would be true to say most of the hops in 1947 were bought on contract?

A. A good percentage, yes, the larger percentage.

Q. Did the 1947 hop crop produce more than it was estimated that it would around in August?

A. I think slightly, yes.

Q. As a matter of fact, wasn't the prevailing estimate around August about 50,000 bales? [309]

A. I wouldn't say that, no.

Q. What would you say?

A. I think it was my estimate of around 70,000 bales.

Q. What was the estimate of Hugo V. Loewi, Inc., or Mr. Oppenheim?

A. I don't know. I will have to speak for myself only.

Q. You did not discuss that? He did not discuss that with you?

A. Discussed it, but I wouldn't know what his estimate was.

Q. Was it over 80,000?

A. I believe around 83,000 actual bales.

Mr. Dougherty: Thank you.

(Witness excused.) [310]

G. R. HOERNER

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name?

A. G. R. Hoerner.

Q. Where do you live? A. Corvallis.

Q. What is your occupation?

A. I am a plant bacteriologist.

Q. Where are you employed?

A. By Oregon State College, Extension Service, and United States Department of Agriculture.

Q. As a plant bacteriologist what are your duties?

A. I am assigned to a study of the hop; downy mildew, as far as my official connections are concerned.

Q. How long have you been engaged in that study of downy mildew?

A. Since 1931, continuously.

Q. All the time in Oregon?

A. That is right, except for visits to adjoining areas.

Q. What has been your professional education?

A. I hold a degree of Bachelor of Science from Oregon State and Master of Science from the University of Minnesota.

Q. What is the date of your Master's degree?

(Testimony of G. R. Hoerner.)

A. 1918.

Q. What has been the nature of your work on research or investigation of downy mildew in hops?

A. Primarily concerned with the development of field control measures.

Q. Have you made a study of the effect of downy mildew upon hops? A. Yes, I have.

Q. Will you state to the Court what the effect of downy mildew upon hops is?

A. The hopvine, from the moment that it appears above ground in the spring until growth is checked by frost in the fall is subject to downy mildew infestation and evidence of it is varied. Early in the spring the first attack consists of drying the vines. The infestation comes at various periods throughout the life of the planting. The type of damage is variable in that it may consist of leaf infestation or kill entirely all or practically all of the side arms or the infestation may mean total destruction in some cases of the floral organs or of the cones in all stages of development.

Q. In order to affect the cone of the hop, when must downy mildew infect that hop with respect to the degree of maturity?

A. Well, the period of floral development usually known to the growers as the burr stage would be, I think, the first stage in the development of the cone at which the infestation could take place.

Q. What would be the effect or possible effect upon the burr at that stage?

(Testimony of G. R. Hoerner.)

A. It might be total destruction and the formation of what has been referred to throughout the hearings as catkins, or brown burrs. We refer to that as alder catkins, which is a descriptive term, in which the burr tends to grow and remain a discolored structure, or the infestation may be partial and the cone may partially develop, be abnormal. The infestation may take place considerably later, of course, after the entire cone has been formed.

Q. If the infestation hits the cone before maturity, what is the effect upon that cone?

A. If it is severe, it may misshape the cone which is pretty near normal in size, or the cone may develop rather completely, and the effect be limited to diseased individual petals of the cone.

Q. Then how does it show in the petals?

A. Discolored, a chocolate or brown color which is distinguishable from other forms of discoloration common to the hop cone.

Q. Does downy mildew sometimes kill the cone before it is fully matured? A. Yes.

Q. In that event, what would be the appearance of the partly killed cone?

A. Something on the order of alder catkins.

Q. Will you inform the Court as to what alder catkins is?

A. It is a floral structure which has the appearance of an infected downy mildew cone.

Q. Does downy mildew affect the lupulin content of the cone? A. I would say yes.

(Testimony of G. R. Hoerner.)

Q. In what way?

A. The ability of the cone to produce lupulin would be reduced in direct proportion to the infestation that has taken place.

Q. Would you say downy mildew might prevent the cone from reaching full maturity?

A. Definitely.

Q. Have you heard the term "nubbin" used during the testimony here? A. Yes.

Q. Does mildew, downy mildew, result in that condition known as "nubbins"?

A. Definitely.

Q. Are you informed as to the extent and nature of the downy mildew infestation of the 1947 Oregon hop crop?

A. In general. I am particularly informed as to the College planting.

Q. That is the Oregon State College planting?

A. That is right.

Q. State the effect of the downy mildew infestation upon that particular planting. [314]

A. In one 10-acre yard of standard varieties, fuggles and late clusters, in the cluster area of that yard I would say that the infestation, by actual count, involved something over 97 percent of the plants in that yard among the late cluster varieties. Of that 97 percent, between possibly 60 and 70 per cent indicated cone infection in varying degrees.

Q. Was that degree of cone infection in 1947 unusual in your experience?

(Testimony of G. R. Hoerner.)

A. I thought it was unduly heavy, I would say.

Q. Can you explain why the 1947 crop was so infected?

A. In our case due to overhead irrigation.

Q. Did you note such infestation in other yards?

A. Yes.

Q. Did you note the cause of the infestation in 1947?

A. Oh, I think without question weather conditions favorable to the development and start of the disease late in the season resulted in heavy cone infection or infestation.

Q. That is to say, mildew infestation late in the season would be likely to produce cone damage, is that right? A. That is very often true.

Q. Was the late infestation in 1947 later than the infestation in previous years?

A. I couldn't say definitely whether it was or not.

Q. Did you note more cone damage from downy mildew in 1947 in Oregon than you had noted in previous years? [315] A. Yes, I did.

Q. To what extent would you say the 1947 was greater than in previous years?

A. I couldn't state as far as the date as a whole is concerned; only in yards observed definitely on the College farm, but I would say considerably more than normal.

Q. On the yards around the College what would be your own judgment?

(Testimony of G. R. Hoerner.)

A. From reports and observations I made personally, I would say it was unusually heavy.

Q. What is the botanical classification of downy mildew?

A. The common term is pseudoparenchyma humuli.

Q. Is that a type of mold?

A. Roughly, it is considered mold or mildew, yes.

Mr. Kerr: If the Court please, I am prepared at this time to go into the matter of the samples, which were referred to by the witnesses as having been delivered to Mr. Hoerner. These samples have just been handed to me by Mr. Hoerner.

The Court: I should think you could stipulate on that. I will give you a few minutes to see if you can do so.

(Recess.)

Mr. Kerr: I would like to interrupt Mr. Hoerner's testimony and put Mr. Paulus back on the stand to identify the samples. [316]

C. W. PAULUS

having been previously duly sworn, was recalled as a witness on behalf of the Defendant and was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Have you brought into court samples of the Geschwill 1947 late cluster hops concerning which you testified? A. Yes.

(Hop samples thereupon marked Defendant's Exhibits 34 to 38, inclusive.)

Q. (By Mr. Kerr): Will you state for the record what those samples are, giving the exhibit numbers.

A. Yes. Exhibit 34, the samples marked A to J, inclusive, represents eleven samples which are tenth-bale samples which were sent to New York to Hugo V. Loewi, Inc., by my office and which have been subsequently—and which were subsequently returned to my office.

Exhibit 35, samples A to H, inclusive, represents ten samples which are the retained tenth-bale split samples which were on the sample racks in my office.

Exhibit 36, A to E, inclusive, represents five type samples which were sent to Hugo V. Loewi, Inc., New York, originally, from my office and subsequently returned.

Exhibit 37, A to E, inclusive, represents five type samples which were retained in my office as splits of the samples [317] which were sent to New York.

(Testimony of C. W. Paulus.)

Exhibit 38, A and B, represents two samples of 1947 clusters—fuggle hops grown by Mr. Geschwill.

With the exception of Exhibit 38, all of the preceding exhibits are representative of Lot No. 79, 130 bales of the Fred Geschwill cluster hops.

Q. Are those samples, those identified by exhibit numbers and letters, the actual samples which you referred to? A. Yes, they are.

Q. Are they the samples concerning which you have testified? A. Yes, they are.

Q. Exhibits 38-A and 38-B are fuggles, are they?

A. They are 1947 fuggles, the 1947 crop of fuggles which were grown by Fred Geschwill.

Q. Were those fuggles accepted and paid for by the defendant? A. Yes.

(Telegram date New York, November 17, 1947, Hugo V. Loewi, Inc., to C. W. Paulus, was thereupon received in evidence and marked Defendant's Exhibit 41.)

(Letter dated December 2, 1947, Hugo V. Loewi, Inc., to C. W. Paulus, was thereupon received in evidence and marked Defendant's Exhibit No. 42.)

(Carbon copy of telegram dated Salem, Oregon, December 1, 1947, to Hugo V. Loewi, Inc., by C. W. Paulus, [318] was thereupon received in evidence and marked Defendant's Exhibit No. 43.)

(Testimony of C. W. Paulus.)

(Carbon copy of letter dated December 2, 1947, C. W. Paulus to Hugo V. Loewi, Inc., was thereupon received in evidence and marked Defendant's Exhibit No. 44.)

(Letter dated November 17, 1947, Hugo V. Loewi, Inc., to C. W. Paulus, was thereupon received in evidence and marked Defendant's Exhibit No. 45.)

(Carbon copy of letter dated October 21, 1947, C. W. Paulus to Hugo V. Loewi, Inc., was thereupon received in evidence and marked Defendant's Exhibit No. 46.)

(Letter dated October 3, 1947, Hugo V. Loewi, Inc., to C. W. Paulus, was thereupon received in evidence and marked Defendant's Exhibit No. 47.)

(Telegram dated September 25, 1947, Hugo V. Loewi, Inc., to C. W. Paulus, was thereupon received in evidence and marked Defendant's Exhibit No. 48.)

(Hop samples were thereupon received in evidence and marked Defendant's Exhibit No. 49. (A to E).)

(Hop samples were thereupon received in evidence and marked Defendant's Exhibit No. 50 (A to E).)

Mr. Kerr: The bailiff will hand you Exhibits 41

(Testimony of C. W. Paulus.)

to 48, inclusive. I will ask you to state what each one is. [319]

A. Exhibit 41 is a telegram dated November 17, 1947.

The Court: Gentlemen, I don't seem to be able to educate you as to how to handle correspondence. Each of these letters is admitted as being what it purports to be, as far as identification is concerned, and admitted that it was sent by the person by whom it was sent to the person to whom it is addressed.

Mr. Kester: We have no objection. They may be admitted as far as we are concerned.

Mr. Kerr: That is all, then. They are all received.

The Court: They are all received.

Mr. Kester: If the Court please, counsel has asked us to stipulate as to these samples. While it comes as a surprise to us, we never having seen them and did not know anything about them, we are willing to stipulate that these samples here on the table are the ones which were delivered to Mr. Hoerner on Mr. Paulus' instructions, and on the statement of counsel that the others, the other samples, are the Geschwill hops we make no objection. [320]

G. R. HOERNER

having been previously duly sworn, thereupon resumed the stand as a witness in behalf of Defendant and was further examined and testified as follows:

Direct Examination (Continued)

By Mr. Kerr:

Q. Did you bring with you some hop samples or a hop sample which you received from Mr. Fry?

A. I did.

Q. Will you state when you received that sample.

A. It was delivered to me by Mr. Fry at Corvallis on the morning of the twentieth, Thursday of the past week.

Q. I will ask you to examine Exhibit 49 (A to E) and state whether or not that is the sample of hops delivered to you by Mr. Fry?

A. That is true, the original sample and the separations which I made from it. They are here.

Q. Did you make a separation of the hop sample submitted to you by Mr. Fry as between the material showing downy mildew disease or effect and the material in that sample not showing such effect?

A. Yes, I did.

Q. Will you state whether or not your determination of what portion of the sample showed downy mildew damage was made at least in part on the basis of a microscopic examination.

A. To check my own visual examination I made an examination of a typical infected cone to assure

(Testimony of G. R. Hoerner.)

me that my microscopical examination and my conclusion that it was downy mildew was correct—my optical [321] evaluation that it was downy mildew was correct.

Q. Could you, optically, readily determine the mildewed affected portions of the samples?

A. Yes, I could.

Q. Will you explain to the court what you did and the results.

A. Of the original sample weighing approximately three-quarters of a pound I took out one-quarter by weight of that sample which I divided into an eighth, a representative portion of the original third of the sample, I should judge, and used that eighth as a sample from which I made my determination in order to get the weights of the affected and unaffected cones in that sample.

Q. Did you of that portion separate the downy-mildew-infected portions from those not affected by downy mildew?

A. I separated each individual cone or part thereof which was free of downy mildew and those which were infected in any way, in any degree, with downy mildew, and weighed the results of the separation separately.

Q. How did you make that separation of downy mildew material from that which was not affected by downy mildew? By hand? A. By hand.

Q. Do you have as a part of Exhibit 49 the separated portion, the result of this separation by you?

(Testimony of G. R. Hoerner.)

A. Yes, I have kept them separate.

Q. Will you describe to the Court the several portions that you have. [322]

A. I have the remains of the original sample submitted, approximately two-thirds of it. I have the unused portions of my separation of that and I have the final one-eighth of the original one-third taken. I have the leaves and stems, the uninfected cones and the infected cones or portions thereof.

Q. What is contained in the package marked Defendant's Exhibit 49(A)?

A. 49(A) is the original two-thirds of the sample I received.

Q. What is 49(B)?

A. 49(B) is the unused portion of my separations from that original sample.

Q. What is 49(C)?

A. 49(C) is the total of infected cones or portions thereof taken from the sample I examined.

Q. What is 49(D)?

A. 49(D) is the total of clean cones or portions thereof from that same sample.

Q. And 49(E)?

A. 49(E) consists of the total leaves and stems removed from the sample examined.

Q. Did you then make a determination as to the percentage by weight? A. I did.

Q. What is that determination?

Mr. Kester: If there is a written report on that, I think we [323] would like the privilege of seeing it.

(Testimony of G. R. Hoerner.)

A. These are my notes, your Honor. I committed these to writing because I probably would not have remembered in detail the exact weights.

The original sample consisted of 23.7 grams total, of which 1.1 grams were leaves and stem, 5.8 grams clean cones or burrs and 13.6 grams of infected cones or parts thereof. In other words, the infected cones or parts thereof constitute 70.1 per cent of the total of cones or parts of cones in the sample examined.

Q. When you speak of infected cones or portions thereof, what do you mean? What do you mean by portions thereof?

A. Individual petals that were broken from the original whole cone in the process of separating the sample.

Q. Do the individual petals you refer to show mildew damage? A. Definitely, yes.

Q. What is the percentage of infected material?

A. 70.1 per cent.

Q. That 70.1 per cent is the percentage by weight of the sample you tested made up of cones or parts of cones? A. That is correct.

Q. Which were affected by downy mildew, is that correct? A. That is.

Q. How could you tell which of the cones or which of the cone petals or portions of cones were so affected?

A. Roughly, in the whole cone you can tell by the malformation, [324] various degrees of malformation from the nubbin stage mentioned through-

(Testimony of G. R. Hoerner.)

out the hearing to the individual petals or cones not fully formed—a wide gradient of the type of infection, all of which was evidence to one experienced in identifying downy mildew.

Q. Could you readily determine the difference between damage resulting from downy mildew and other types of infestation or disease?

A. Yes, I think that is true.

Q. Did you make a determination or estimate on a visual basis of that particular sample containing the infected material?

A. Yes, I did. Before attempting to secure the weights I made an estimate of the discoloration on the face of the sample as a whole.

Q. That is, discoloration caused by what?

A. By downy mildew infection.

Q. What was your estimate of the percentage by weight of that infestation?

A. Roughly, 35 per cent of the surface visible to the eye showed discoloration due to downy mildew.

Q. Then can you explain the variation between that estimate based upon visual examination of the face of the whole sample and the ultimate percentage determined by the manual separation of the infected material from the sample?

A. My anaylsis of the difference in this case would be of a [325] rather heavy percentage of the so-called nubbins which, on the surface of the sample, did not readily show up in sufficient amount at least for me to come closer to the actual weight when separated.

(Testimony of G. R. Hoerner.)

Q. Did you find some proportion of nubbins?

A. Yes, I did.

Q. State whether or not in your judgment the procedure which you followed in determining the downy-mildew-infested or infected portion of the sample was an accurate method.

A. Would you read that question?

(Question read.)

A. As accurate as I would know how to perform such a function.

Q. You believe it was performed with reasonable accuracy? A. Yes, I do.

Q. The bailiff has handed you Exhibits 50 (A to E, inclusive). Will you state what they are, beginning with 50(A)?

A. 50(A) is the two-thirds remains of the lot sample from Lot No. 401 which was delivered to me by Mr. Netter.

50(B) contains the remnants or unused portion of the separations I made in arriving at my conclusions as to the sample after careful analysis.

50(C) consists of the portion of the sample that I examined, constituting the clean or uninfected cones or portions thereof.

Exhibit 50(D) consists of the leaves and stems separated [326] from the sample I examined.

Exhibit 50(E) consists of the infected cones or portions thereof from that sample.

(Testimony of G. R. Hoerner.)

Q. Did you make a similar determination by weight? A. Yes, I did.

Q. Will you state what your determination of the percentage of infected material in the sample was? A. 60.44 per cent by weight.

Q. That is 60.44 per cent? A. Yes.

Q. What is that?

A. It consists of the number of grams of infected cones from the total amount of cones in the samples examined. The other represents the count by weight, consists of leaves and stem and clean cones, and then that here represents the number of cones which were infected.

Q. Did you use the same method of separation?

A. The same procedure exactly as in the former case.

Q. Did you also make an estimate on visual examination?

A. Of the discoloration of the sample as a whole, yes. My estimate was 50 per cent.

Q. Just how did you make that visual examination for the purpose of your estimate?

A. I simply split the sample as delivered and viewed one face of the split. [327]

Q. Can you account for the fact that your visual examination in respect to Exhibit 50 was closer to the ultimate percentage determined by the manual separation method than was the case with respect to Exhibit 49?

A. I think because there were less nubbins in

(Testimony of G. R. Hoerner.)

this sample and that the split face showed more accurately the discoloration than was true in the first sample examined.

Q. This discoloration you mentioned, was that discoloration from downy mildew damage?

A. Yes.

Q. Do you consider the method which you used with respect to Exhibit 50 to be the accurate method, an accurate method?

A. Yes, I think as accurate as I could devise.

Q. You consider that to be reasonably accurate, then? A. I do.

Q. The bailiff will hand you Exhibit 34(E).

Mr. Kester: I would like to see the marking on the sample before it is referred to.

Q. (By Mr. Kerr): Will you open the sample which has been handed to you by the Bailiff and examine it and tell the Court whether or not you note therein any cones or parts of cones affected by downy mildew? A. Yes, I do.

Q. How do those affected parts appear?

A. Many nubbins here in this sample and some individual petal [328] discoloration due to downy mildew.

Q. I will ask the Bailiff to hand you what has been marked as Exhibit 34(B).

The Court: How many packages are you going to hand him?

Mr. Kerr: I think these are the only two, sir.

The Court: Not all of these over there?

(Testimony of G. R. Hoerner.)

Mr. Kerr: No, sir.

Q. Will you take that sample and examine it and tell the Court whether or not you note in that sample cones or parts of cones affected by downy mildew?

A. I think I do, and to a greater extent than the last one.

Q. Indicated by what?

A. The presence of many nubbins and affected petals.

Mr. Kester: Before you finish, we would like it identified in the record.

Q. (By Mr. Kerr): Will you state the exhibit number which appears on that sample?

A. This is Exhibit 34(B).

Mr. Kester: What bale does that appear to come from?

A. Lot 79; no individual bale number, I think on it.

Mr. Kester: I see. Thank you.

Q. (By Mr. Kerr): State how that sample appears from visual examination, how it compares on visual examination with the two samples that you received from Mr. Fry and Mr. Netter with respect to downy-mildew infestation. [329]

A. Without reference to the original two that I examined more closely, I would say it is nearly as bad, from visual observation.

Q. That is to say, the amount of infestation is nearly as much? A. I would say so, yes.

Mr. Kerr: That is all.

(Testimony of G. R. Hoerner.)

Cross-Examination

By Mr. Dougherty:

Q. I wonder if you would kindly examine Exhibit 34(K) and 34(D).

A. I find evidence of mildew in both samples.

Q. How do they compare with the other two that you have just examined?

A. 34(K) I think is about on a par with the two just examined, and certainly less in 34(D), but still there is mildew evidence.

Q. Will you tell us what the bale numbers of those are, please, Mr. Hoerner?

A. 34(K), Bale No. 100; 34(D), Bale No. 70.

Q. I wonder if you would mind re-examining Exhibit 34(B) and tell the bale number on that one.

A. Bale No. 130 on No. 34(B).

Q. Do I understand you that about 97 per cent of the late cluster hops in Oregon in 1947 showed some mildew damage?

A. No, on our own experimental yard at Corvallis.

Q. How does that experimental yard compare with the average, as far as you know? [330]

A. I would think it would be heavier than average.

Q. You think it would be somewhat heavier?

A. Yes, I would expect it to be.

Q. Have you any idea what the average would be? A. No, I have not the slightest.

(Testimony of G. R. Hoerner.)

Q. Is this type of test you made at the request of Mr. Paulus, is that the usual type of test?

A. More in connection with commercial transactions. This is the first request I have had to make such a test.

Q. The first request you have had? A. Yes.

Q. How many years have you been with the college in the type of work you are doing now?

A. It will be eighteen years this coming March.

Q. This is the first request of this type you have had in that eighteen years, is that correct?

A. Yes, that is right.

Q. Do you know of your confreres at the college making similar examinations?

A. Are making or have made?

Q. Have made.

A. Not to my knowledge.

Q. Not to your knowledge? A. No.

Q. In connection with Sample 49, I wonder if you would mind [331] referring to the notes which you may have in your pocket. A. Sample 49?

Q. Exhibit 49. That is the first one. A. Yes.

Q. What was the total weight of the sample which you used? A. 20.5 grams.

Q. 20.5 grams? A. Right.

Q. What percentage is that of the sample that you had available?

A. It is about one-eighth of a third.

Q. One-eighth of a third?

A. Yes. It is one-eighth of a third.

(Testimony of G. R. Hoerner.)

Q. In examining it did you separate out the individual petals that showed mildew damage or mildew discoloration?

A. In determining or arriving at the total weight of infected material, these cones which remained as cones unseparated were added to the pile from which they had been obtained. In the case of the shattered petals that were affected, they were added to that pile and the total weight secured in that way, both in the case of clean and affected cones or parts thereof.

Q. So, then, as I understand it, to the whole cones were also added the small bits of material?

A. That is right.

Q. Let us assume that you found in a whole cone one slight discolored spot on a petal, in which group would you place that? [332]

A. That would be an affected cone.

Q. An affected cone? A. That is right.

Q. That small discoloration?

A. That is right.

Q. Then, as I understand it, the so-called unaffected cones were those which showed no trace of mildew? A. That is correct.

Q. Do I understand that you made at Mr. Paulus' request no separation of nubbins, as such?

A. I had no such request made. I did not separate them, as far as weighing them separately is concerned.

Q. Have you any idea what the average of the

(Testimony of G. R. Hoerner.)

1947 Willamette Valley late cluster hops on such an examination as this would be?

A. I haven't the slightest idea.

Q. But, as I understand it, about 97 per cent of the late clusters showed mildew damage?

A. Yes, and had, I think I stated, between 60 and 70 per cent cone infection.

Q. Did you, in 1947, ever examine Mr. Geschwill's yard? A. No.

Q. Did you examine any of Mr. Geschwill's sample or examine any of his hops in the bale?

A. No, I didn't.

Q. Was 1947 a heavier mildew year in the Willamette Valley than [333] the customary mildew attack?

A. The reports would so indicate. It certainly was in our yard.

Mr. Dougherty: Thank you.

(Witness excused.)

EARL WEATHERS

was thereupon produced as a witness on behalf of Defendant, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Earl Weathers.

Q. Where do you live? A. Salem.

(Testimony of Earl Weathers.)

Q. What is your occupation?

A. Farming and dusting contracted for.

Q. Dusting with what?

A. Dusting insects, for hops and nuts and so forth.

Q. You sell dust, do you, to the hop growers?

A. Yes.

Q. Have you ever been employed by Mr. C. W. Paulus? A. Yes.

Q. When?

A. I helped him out. I helped Mr. Fry in his work in the last two falls.

Q. Were you employed by Mr. Paulus in 1947?

A. Yes, I was.

Q. Were you present when Mr. Fry took samples of the cluster hops grown by Mr. Fred Geschwill in 1947? A. Yes, I was. [335]

Q. Where was that?

A. It was in Schwab's warehouse at Mt. Angel.

Q. What were you doing there?

A. Well, I was helping pull from the bales, getting tryings. I helped weigh them.

Q. Were you employed by Mr. Paulus at that time? A. I was.

Q. How closely did you work with Mr. Fry at that time?

A. I worked right with him. We worked together.

Q. Do you recall any statement by Mr. Fry to

(Testimony of Earl Weathers.)

Mr. Geschwill at that time concerning the quality of Mrs. Geschwill's hops?

A. Well, all I heard was—Mr. Fry was trying to separate the hops and he found some of them that looked a little better and mentioned that to Mr. Geschwill.

Q. Did you see what occurred after that?

A. Yes. I pulled from the bales that had—that we punched from the opposite side, punched from the opposite side.

Q. What was done with those bales?

A. Well, Mr. Fry punched the top and then examined the tryings that he took out, and then pulled some samples, and then we went back and punched the other side of the bale.

Q. Do you recall what the conversation was between Mr. Fry and Mr. Geschwill with respect to those particular bales? A. Well, no. No.

Q. Did you hear Mr. Fry make any statement to Mr. Geschwill that [336] these were the finest hops that he had examined yet?

A. I never heard him say that.

Q. Did you hear him make any similar statement? A. No, I never.

Q. If he had made such a statement, would you have heard it?

A. Well, I should have been able to. I was with him when we were taking in the hops, and I think I would have heard it.

Q. Do you know Mr. Fournier?

A. No, I don't.

(Testimony of Earl Weathers.)

Q. Do you recall whether Mr. Geschwill was present all the time that Mr. Fry sampled the hops?

A. No, he wasn't there all the time we were taking them in.

Q. Are you a hop grower? A. Yes, I am.

Q. How long have you grown hops?

A. Well, I have only grown hops myself since 1936.

Q. Have you grown hops continuously since 1936?

A. Well, I have been with the hops. I worked for Hart's company over there in hops and then when we came out of there I went in hops of our own.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. When you were helping Mr. Fry take in the hops, was he doing [337] the inspecting, or you?

A. He was.

Q. If there had been any conversation between Mr. Geschwill and Mr. Fry at that time, October 10, 1947, would you remember it now?

A. Yes, I would, because it happened to be one of the lots there were a lot of controversies about, and I think I would remember it. I never heard Mr. Fry make that remark about any lot of hops he was taking in.

Q. If Mr. Fry did make such a remark, then, it

(Testimony of Earl Weathers.)

would indicate it was an unusual lot of hops, is that correct? A. It would, yes.

Mr. Dougherty: Thank you.

(Witness excused.)

HAROLD W. RAY

was thereupon produced as a witness on behalf of Defendant, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. Harold W. Ray.

Q. Where do you live, Mr. Ray?

A. I live in Hillsboro.

Q. What is your occupation?

A. I am a hop dealer and also a hop grower.

Q. Where is your hop acreage located?

A. In Marion County, across the river from Newberg.

Q. How long have you been engaged in growing hops? A. Fifty years.

Q. What is your present acreage of hops?

A. About 305 or -6.

Q. What type of business have you done with respect to dealing in hops? Do you buy from growers?

A. I buy from growers, yes, buy and contract.

Q. On your own account?

(Testimony of Harold W. Ray.)

A. No, not—well, we buy on order on a commission basis.

Q. By "we" do you mean yourself?

A. No, I mean the A. J. Ray & Son Corporation, of which I am president. [339]

Q. How long have you been engaged with A. J. Ray & Son, Inc?

A. Well, since about 1902 or 1903. Prior to that time I was in business as an individual for several years.

Q. In the hop-buying business?

A. In the buying—in buying hops, yes.

Q. What is the business of A. J. Ray & Son?

A. Buying hops solely. That is their only business.

Q. Does it sell hops to brewers or to dealers?

A. To dealers.

Q. Does that company act as broker in buying hops?

A. Well, I would assume that you would call it a broker.

Q. Are you active in that business, A. J. Ray & Son?

A. Yes. I am the manager and head of the concern.

Q. Specifically, what function do you perform in connection with this business of buying hops from growers?

A. Well, I manage it; I supervise the entire op-

(Testimony of Harold W. Ray.)

eration. I do not personally do all the buying. I have field men who do the buying.

Q. Do you personally examine samples of hops you buy?

A. Practically all of them.

Q. In connection with your business activities, in a year do you examine very many samples of Oregon late cluster hops?

A. Yes, I should say between two and three hundred lots every year.

Q. What total volume in sales would that represent?

A. That quantity of samples, that number of samples that I examine? [340]

Q. Yes.

A. That would be difficult to state, but it would be a very fair percentage of the entire state crop. Now, I will have to qualify that statement, because in the past few years there have been a very large percentage of hops under contract. It is not our custom to take samples of lots of hops that are under contract to another dealer.Therefore, the percentage of the total crop that we have taken samples of in recent years would not be as great as I previously indicated.

Q. Would you explain, Mr. Ray, what you mean when you refer to taking samples of hops under contract to another dealer. Is that another dealer for whom you buy?

A. No. I mean a dealer—you might say a com-

(Testimony of Harold W. Ray.)

petitor. If they have a contract on a lot of hops, we don't sample those hops.

Q. You sample your own hops under contract?

A. That we have contracted on, or hops that are free for sale.

Q. Does your firm, either on its own account or on behalf of others negotiate contracts for futures in hops? A. We do, yes.

Q. State whether or not to your knowledge there are any contracts between dealers and growers in Oregon for hops for future delivery other than for prime quality hops? A. I never heard of it.

Q. What proportion of the Oregon production would you say normally is sold on a spot basis? [341]

A. That varies a great deal from year to year, but during the past number of years probably 80 per cent or more of the total crop have been sold on what you call future contracts.

Q. Does it follow that 80 per cent is sold on a prime quality basis?

A. Yes, all of them, I guess.

Q. With respect to spot sales, how are those purchased? On a prime quality basis?

A. No, we buy spot hops on samples entirely, they are traded entirely upon samples.

Q. That is to say, a grower submits samples to the dealer?

A. Yes, submits samples to us as buyers and we submit samples to our customers, and all of our

(Testimony of Harold W. Ray.)

trading is based upon those samples. We give each a sample number and send a duplicate of the sample to the eastern office. We file it under the same number and all of our correspondence and dealings with respect to those hops is done with reference to those sample numbers.

Q. Do you know of any instance where a future contract between a dealer and a grower for hops has described the hops covered by the contract as choice in quality? A. No, I never heard of it.

Q. What is the meaning as used in the trade of the term "prime quality" with respect to hops?

A. I can't describe that to you any better than the contract itself describes it. It is something that it is impossible to [342] put entirely in words, and if an attempt is made to put it in words I think the description that is contained in the hop contract will do it as well as it can possibly be done.

Q. Will you examine the contract in this case, which is Exhibit No. 1. A. Yes.

Q. Particularly with reference to the description of the hops covered by that contract. A. Yes.

Q. Beginning with the words "that such hops shall not be the product of the first year's planting."

A. Yes.

Q. State whether or not in your opinion that is an accurate description of the characteristics of a prime quality hop as that term is used in the industry.

A. In my opinion it is, Mr. Kerr. It is not

(Testimony of Harold W. Ray.)

exactly the same description that we use in our own contract. I think we have a little more detailed description in our own contract than there is in this but, generally speaking, I would say that this would be a very fair description. As near as I can say, it describes what we know as a prime hop.

Q. On the basis of that description, Mr. Ray, set forth in Exhibit No. 1 of a prime hop, can you determine whether or not a particular lot of hops qualifies as prime quality under that description?

A. Yes, certainly.

Mr. Kester: You are asking the witness to pass on his own qualifications. I think probably that is a matter for the court to do.

The Court: He is entitled to hold his own opinion of himself. I have never heard that urged before.

Q. (By Mr. Kerr): Can the presence of mold in hops be readily detected after they are baled?

A. Yes, indeed.

Q. Can it be readily determined whether or not baled hops are in sound condition? A. Yes.

Q. Can it be readily determined whether or not baled hops are of good color?

A. It can be readily determined by a person who is accustomed to dealing in hops, and who understands the quality and grading of hops.

Q. What is the meaning of the term "good color" as used in the trade with respect to the color of hops?

A. I don't know how to tell it to you. I could

(Testimony of Harold W. Ray.)

show you, but I don't know how to put it in words. It is attractive, bright and of fine color, that would not be marred by what we know as discoloration. It might be a greenish color; it might be yellowish, or a combination of the two. Bright color is what is desirable to make a good color. [344]

Q. With respect to maturity, can it readily be determined whether or not hops in bales are fully matured?

A. To a very close degree it can be, yes.

Q. How is that determination made?

A. It would be by visual appearance and also, more so, by the aroma of the hop. An immature hop has a definite aroma, as we call it, immature.

Q. Can it readily be determined on examination of hops taken from a bale whether or not those hops are in sound condition, in good order and condition?

A. By a person who is accustomed to the business, yes.

Q. Mr. Ray, when you pass upon a lot of hops to determine whether or not the same are of prime quality, just what process do you follow?

A. We examine the hops, the visual appearance of the hops; we rub some of the hops up to get an aroma; we feel of the samples to get the feel of the texture of the hop; and in our visual examination we take into consideration the condition and appearance of the lupulin, whether it is in proper condition, whether it has been injured, and also whether

(Testimony of Harold W. Ray.)

or not the hop is cleanly picked and that the color is even, bright, and not blemished with imperfections.

Q. Is that the method, to your knowledge, commonly followed in the hop industry in determining whether or not a particular lot of hops is of prime quality? [345]

A. Well, in the past few years, Mr. Kerr, we have developed upon an official analysis of the hops for the determination of extraneous matter and seed content and so forth. We therefore have an autopsy, you might call it. We depend upon the official certificates, the inspection certificates, to indicate the percentage of extraneous matter and also the percentage of seeds. Other than that it is done entirely by visual examination and by sample and feel, and smell, I should add.

Q. What is meant by the term "extraneous material" as you have used it?

A. Well, it refers generally to leaves and stems, hop leaves and hop stems, but it would also refer to any other matter in a bale of hops that should not be there, some foreign matter, weeds or dirt or anything of that sort which I think would be included in "extraneous matter."

Q. Are hops themselves considered extraneous? For instance, damaged hops?

A. Not necessarily, no.

Q. So hops themselves affected by disease or

(Testimony of Harold W. Ray.)

mildew won't be considered as extraneous, within that term, is that right?

A. If you are referring to what you have been calling here nubbins during this hearing, it is my opinion and my understanding that they are not referred to in the analyses, in the official analyses, as extraneous matter.

Q. Would you say that disease of the hop cone or the effect of [346] disease on the hop cone would affect its color? A. Why, certainly.

Q. In what way?

A. Well, it would discolor it, depending upon what the difficulty was. I don't know of any trouble with a hop cone that you term disease. I can't think of any that affects the hop other than downy mildew. We have mold. I don't believe you would term that a disease.

Q. Are hops sometimes affected by blue mold?

A. Yes, blue mold. Blue mold, that is caused by certain climatic conditions, damp weather and improper storage, and it is a mold that gathers on the outside of the bale and frequently will affect it into the hops, an inch or two or more, sometimes more serious than that; has been in years past.

Q. Have you had downy-mildew-affected hops in your yard? A. Oh, yes, indeed.

Q. Were they so affected in 1947?

A. Yes, they were.

Q. How did that affect the 1947 hops?

A. The attack of downy mildew in my particular

(Testimony of Harold W. Ray.)

yard in 1947 occurred later than some, later than the average, so that the infection of the cone came about later. My cones, in other words, were practically matured before they became affected by downy mildew, and there were portions of the yard that were seriously marked by downy mildew discoloration. [347]

Q. When, with respect to the forming of the bloom, would mildew affect your yard?

A. After the blossoms had formed burrs; in fact, after the burr was practically grown, in my particular yard; that is, to the greatest extent. Of course, occasionally you will find vines in yards which are more undeveloped or more immature than other vines. In that case some blossoms would have been affected, and there would be some nubbins, too, but the quantity was very small in my——

Q. Did you see other yards in 1947 affected by downy mildew? A. Many of them.

Q. Were they affected similarly to yours, or how were they affected. Were they affected at different times?

A. Different yards were infected at different periods. The general average would run, I should say, from early in August, the first part of August, until the harvest is completed. In yards that had their early infection, where it blighted the blossoms and blighted the small immature burrs, that infection might not, in many yards, have continued, so that the marking of the cones might not have been as

(Testimony of Harold W. Ray.)

serious as would have been the case in my own particular crop where the cone was very seriously infected.

Q. To your knowledge were some of the 1947 Oregon clusters affected by downy mildew at a time that resulted in the burrs or cones not fully maturing? [348] A. Will you repeat that, please.

(Question read.)

A. Yes.

Q. How would those immatured cones show in the samples?

A. It would depend somewhat upon the state of immaturity. If they were very immature, so that the hop burr or cone was only of small growth, it resulted in completed destruction of that small cone and made what we call or what has been referred to in this case as nubbins, which were brown and entirely dead.

In the case of hops of somewhat slightly more maturity, it would have resulted in disfiguration of the hop itself; that is, in shape, and also marking.

Still later on, if the maturity was still greater, in fact, when the hop was fully grown, it would result then in the marking of the petals, to various degrees.

Q. Are hops which show the effects of downy mildew considered sound hops?

A. In my opinion they would not be.

Q. Would they be of good color?

(Testimony of Harold W. Ray.)

A. They would not be.

Q. Would they be in good order and condition?

A. They would not be.

Q. Does the presence of visible damage by disease affect a hop as to whether or not it is a prime hop?

A. A hop that is affected with disease—As I said a while ago, [349] the only disease that I know of that affects them is downy mildew, which discolors and marks the cone. In my opinion, a hop that is marked with downy mildew cannot be a prime hop.

Q. Does the term "downy mildew" as used in the hop industry refer to a constant, uniform standard of quality and condition, or does it refer to a standard which varies from year to year?

A. Why, it varies greatly, not only from year to year but as to different parts of the season.

Q. With respect to the standard of quality referred to in the industry as prime quality, does that standard of quality, known as prime quality in the industry, vary from year to year?

A. It has been the same the whole fifty years of my experience in the hop business. There has been no variation whatever.

Q. It has been testified to by some witnesses in this case, Mr. Ray, that, as used in the industry, the term "prime quality hop" means the average quality produced in a particular area during a particular year.

What is your opinion as to whether or not that is

(Testimony of Harold W. Ray.)

an accurate statement of the industry's use of the term "prime quality?"

A. That is not the case among the industry, on the buying end or the consuming end of the industry.

Q. Would you consider that to be a practical or usable standard at all?

Mr. Kester: I think that is entire irrelevant. [350]

A. I think it is very impractical.

Q. (By Mr. Kerr): Why?

A. If a crop was entirely ruined, would you call that a prime hop? A prime hop never varies from year to year. It is the same one year as another.

Q. To your knowledge, does the percentage or proportion of a year's crop of hops in Oregon differ from the percentage of that year's hop crop in the State of Washington, which is of prime quality?

A. Well, it does, certainly; it may differ; it may not differ, but it very likely could.

Q. Would the same thing be true as between Oregon and California? A. Why, yes.

Q. To your knowledge, were there late cluster hops produced in Oregon in 1947 which did meet the requirements of prime quality, as you understand it?

(Question read.)

A. Yes, they were the same.

(Testimony of Harold W. Ray.)

Q. Did your firm make purchases of hops in Oregon during the month of October, 1947?

A. I think so, yes.

Q. And during the month of November?

A. You are speaking of spot purchases?

Q. Spot purchases, yes. A. Yes. [351]

Q. Did your firm make spot purchases of hops in Oregon after October, 1947?

A. Yes, we made them in November.

Q. Those were the 1947 crop of hops, were they?

A. Yes.

Q. Did you make such purchases of late cluster hops in Oregon? A. Yes.

Q. Can you state what prices were paid by your firm for such purchases?

A. For cluster hops?

Q. For cluster hops.

A. It was generally on the basis of 85 cents a pound for eight per cent leaf-and-stem content. We paid 86 for some and 84 for some.

Q. Were those prime quality hops?

A. Yes.

Q. Do you recall the approximate date in November that you made such purchases?

A. Well, may I refer to a memorandum?

Q. You may.

A. I think the last one in November of 1947 was November 14th.

Q. What price did you pay?

(Testimony of Harold W. Ray.)

A. 86 cents a pound for the seven per cent pick.

Q. Those were late clusters, Oregon hops?

A. Late clusters, yes. [352]

Q. How many bales?

A. Mr. Kerr, I will have to recall that answer. Those were early clusters, that last purchase.

Q. Was there any difference in the market value at that time of early clusters and late clusters?

A. Of the same quality, no. No, there was no difference.

Q. How many bales would that be?

A. That particular last purchase was 79 bales. That was 79 bales, the last purchase that we made.

Q. That was a spot purchase, too?

A. Yes.

Q. What was the market value of prime quality Oregon late cluster hops during October, 1947?

A. 85 cents a pound for eight per cent leaf-and-stem content, for hops which otherwise were prime.

Q. What was the market value for such prime hops in November? A. In November?

Q. Yes. A. The same.

Q. To your knowledge, were any prime quality Oregon late cluster hops on the market, that is, available for purchase, in December, 1948?

A. No, not to my knowledge. There might have been, but we tried to find some and couldn't find them.

Q. I should have said December, 1947. [353]

(Testimony of Harold W. Ray.)

A. I so understood that that was what you were referring to.

Q. Your answer refers to that date?

A. I refer to 1947 hops.

Q. If there had been an appreciable quantity of such hops available for sale, is it likely you would have known of it?

A. I think it is more probable I would have.

Q. Very probable? A. Yes.

Q. Would you say that hops which contain 10 per cent by weight of immatured hops, referred to here as nubbins, would grade as prime quality?

A. No, in my opinion they could not.

Q. You stated that your 1947 crop of hops was affected by downy mildew, I think? A. Yes.

Q. Were any of your hops rejected by the dealer-buyers to whom you sold?

A. Well, they were rejected by myself. I didn't have the nerve to offer them to them, 274 bales of them.

Q. Why didn't you offer them to them?

A. Because they were not a prime hop.

Q. Were they covered by future contracts?

A. Yes.

Q. Was that a futures contract referring to prime hops? A. Yes. [254]

Q. Was the definition of "prime hop" in that contract similar to the description of "prime quality hop" referred to in Exhibit No. 1?

A. Not exactly, but similar.

(Testimony of Harold W. Ray.)

Q. In your opinion would your 1947 crop of hops, which you say you rejected, have qualified as prime quality hops under the contract here involved? A. No. It would not.

Q. Why not?

A. Because they were not prime quality. They were badly infected with mildew.

Q. Have you, as yet, sold those hops that you say did not meet the requirement of your contract?

A. I have tried to, but I have been unable.

Q. What is the reason for your inability to sell them?

A. Because they are infected with mildew.

Q. You are being handed what is marked as Exhibit 34(D). Will you please examine that and state whether or not in your opinion that is a sample of prime quality hops as that term is used in the industry?

A. Basing my opinion upon only one thing—that is, the mildew content—my opinion is that it could not possibly be a prime hop.

Q. Why?

A. Because it is infected with downy mildew; there is a very considerable number of these brown nubbins and there is some degree [355] of marked cones.

Q. Would you refer to the wrapper on that exhibit and state what the bale number shown thereon is.

(Testimony of Harold W. Ray.)

A. Defendant's Exhibit 34(A). There is a "G" up in the corner. I don't know what that means.

Q. That is 34(G), is it not?

A. I don't know. I guess the "A" has been marked out and "G" put in above it.

Q. Does that show the bale number?

A. No. Wait a minute. Over on the other side it does, yes. Yes, Bale No. 60, 30 bales 1947, Lot 79.

Q. What is the bale number, please?

A. Bale No. 60.

Q. You are being handed Exhibit 34(H). Will you make a similar examination of that sample and state whether or not in your opinion it is a sample of prime quality hops.

The Court: How many do you have there?

Mr. Kerr: Well, sir, we have altogether——

The Court: He has seen them all. He knows what he is going to answer.

A. No, I have not.

The Court: Have him look at them sometime out of court.

Mr. Kerr: All right, sir.

The Court: He can testify in bulk about all of them.

Mr. Kerr: We will handle it that way. [256]

Mr. Kester: May we have the privilege of asking him to specify the samples on cross-examination?

The Court: Certainly. We will pass that now. He is going to look at these out of court so he can come in and testify he has seen them all.

(Testimony of Harold W. Ray.)

Mr. Kerr: That is all with this witness at this time, your Honor.

The Court: Defer your cross-examination, so we can have the examination all at one time.

Mr. Kester: Yes, your Honor.

(Witness excused.) [357]

H. F. FRANKLIN

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Please state your name.

A. H. F. Franklin.

Q. Where do you live, Mr. Franklin?

A. Springfield, Oregon.

Q. What is your occupation?

A. Nut grower.

Q. Have you ever been employed as an inspector of hops? A. Yes, I have.

Q. When?

A. From 1923 until 1943 I was with the J. W. Seavey Hop Corporation, and in 1944 and 1945 I worked for Louis Epp.

Q. What type of work were you doing for these firms?

A. I was road man, buying and inspecting hops, and some work in the office, sample room.

(Testimony of H. F. Franklin.)

Q. Over what period of years did your experience in inspecting hops extend?

A. I would say from about 1930 on.

Q. And for how many years after 1930?

A. Until 1945, I guess; 1945 was the last season.

Q. During that time were you actually engaged in inspecting and [358] grading hops?

A. Yes, I was.

Q. Hops produced in what states were inspected by you?

A. In Oregon, Washington and one time I was in California, in Sonoma County.

Q. Did that experience include various types of Oregon hops? A. Yes, it did.

Q. Are you familiar with the term "prime quality" as applied to hops? A. Yes, I am.

Q. What does the term "prime quality" mean to you or what do you understand it to mean in the industry with respect to hops?

A. Well, it is a term used in contracting hops.

Q. And what are factors which go to make up a prime quality hop?

A. Well, that is usually stipulated in the contract. A prime quality hop must be cleanly picked, with even color, free from mold, free from disease and contamination.

Q. Is sound condition a factor of prime quality?

A. Yes, and sound condition; 24-ounce baling cloth, 8-ply sewing twine, stitches only two and a half inches long, and so on.

(Testimony of H. F. Franklin.)

Q. Is good color a factor of prime quality?

A. Yes, it is.

Q. What is your understanding of "good color"?

A. Healthy, clean; it might be green; it might be yellow; it might be greenish-yellow; a healthy color. [359]

Q. By "healthy color" you mean what?

A. Free from disease.

Q. That is to say, the color of the hops, free from disease; is that what you mean?

A. Yes.

Q. What about the condition? You say sound condition is a factor of prime quality?

A. Yes. Well, if the hop was affected by any of these points that they are bringing up, that definition of prime hop—it would not be in sound condition.

Q. Is a hop, if it is affected by downy mildew, in sound condition? A. No, it is not.

Q. It has been testified here that the term "prime quality" as used in the hop trade means an average of the quality or condition of the hops of a particular area during a particular year. Do you agree with that? A. No, I don't.

Q. Why not?

A. Well, if the Oregon crop was to be affected completely by downy mildew and the Yakima, Washington, crop would be absolutely not affected at all, why, your Oregon crop would certainly not be prime and the Yakima crop would be.

(Testimony of H. F. Franklin.)

Q. State whether or not the term "prime quality" as used in the hop trade, refers to a constant, uniform standard of quality.

A. In my opinion it does. [360]

Q. Or to a standard which varies or changes from year to year?

A. It is the same quality. Prime quality is the same quality, regardless.

Mr. Kerr: This witness also, your Honor, has not seen any of the samples that we have on hand. We will do the same as with the other witness.

The Court: Do it the same way, yes. Step down now.

(Witness excused.) [361]

RALPH E. WILLIAMS, JR.

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. Ralph E. Williams, Jr.

Q. Where do you live, Mr. Williams?

A. Portland.

Q. What is your occupation?

A. Hop dealer and broker.

Q. Are you the Ralph E. Williams of Williams & Hart? A. Yes.

(Testimony of Ralph E. Williams, Jr.)

Q. What is the nature of the business of Williams & Hart?

A. It consists principally of buying and selling hops, and we do produce some ourselves.

Q. Was Mr. Hart a partner of yours?

A. Yes.

Q. Is he now living? A. No.

Q. When did he die?

A. In June of this year; I mean, 1947; 1948, I am sorry.

Q. June, 1948? A. Yes.

Q. Does your firm buy Oregon hops? [362]

A. Yes.

Q. Did you buy such hops in 1947?

A. Yes.

Q. And in 1948? A. Yes.

Q. It has been testified that the late cluster hops produced by Mr. Geschwill, the plaintiff in this case, in 1947, were purchased by your firm. Were they so purchased? A. Yes.

Q. Were they purchased under contract or based on sample?

A. Being what we call in the trade spot hops, they were purchased and sold on identical samples.

Q. That is what you call a spot purchase and sale? A. Yes.

Q. Do you have any connection with the operation of picking machines? A. Yes.

Q. In what particular? How are you connected with the picking machine operation?

(Testimony of Ralph E. Williams, Jr.)

A. I am president of an organization known as Hop Harvesters, which organization commercially picks and harvests hops in the Willamette Valley.

Q. Does that organization own and operate hop-picking machines? A. Yes.

Q. What type of machines are they, portable or fixed? [363] A. Fixed.

Q. Is that the type of machine to which hops are hauled from the yards? A. Yes.

Q. Rather than going out into the yards and picking there? A. Yes.

Q. Are you, therefore, familiar with different types of hop-picking machines?

A. Yes, and I have likewise operated, in other areas, the portable types.

Q. Are you familiar with the machine located at Mt. Angel?

A. I am familiar with it in a general way, yes.

Q. Are you familiar with that type of machine?

A. Yes.

Q. Do you recall the name of that type?

A. It is called the Danshauer, a machine made by an outfit in Santa Rosa.

Q. It has been stated here that that machine removes nubbins or immature hops from the hops which are put through it; that is, removes them from most all the hops which come out of the machine. Would you agree with that?

A. I would say the basic principle of the machine itself would not tend to remove the nubbins. It

(Testimony of Ralph E. Williams, Jr.)

would have a tendency to remove infected cones where the cone is fully matured. In fact, it will shatter the mildewed cone and will blow it onto the wide belt—— [364]

Q. Why will immature affected cones not be shattered?

A. I just assume from the term "nubbins" used here that whoever originated that term must have meant that it was very firm, almost like marble, and an immature hop in that stage is—well, that means they don't have any petals on them at all; it is just a stunted core, but, nevertheless, they are firm and won't break up very easily.

Q. What method is used in that machine at Mt. Angel for removing extraneous matter? Is it air or a screen, or what method is used?

A. Both methods are used, but the final cleaning process is air.

Q. Does that differ from the cleaning process employed in your machine, the machines of Hop Harvesters, Incorporated?

A. Not basically, no.

Q. Does your firm, Williams & Hart, sell hops to breweries? A. Yes.

Q. Are they sold as prime or choice quality hops?

A. Prime quality. We have never used the term "choice".

Q. The hops which you sell to breweries are termed "prime"?

A. Yes. We sold on Federal contracts——

(Testimony of Ralph E. Williams, Jr.)

Q. Sales to breweries on contracts, however, after the war?

A. Yes. That is what I mean. That is where that term "prime" is used.

Q. In your own contracts is the quality generally specified? A. In the sales contracts.

Q. In contracts with breweries? [365]

A. Yes. It is just qualified to the extent of using the word "prime". In other words, the detail that appears in the purchase contract from growers does not appear in the sales contract with the brewery. Just the word "prime" is used to mean—the meaning is the same.

Q. Did your firm make spot purchases of Oregon late cluster hops in 1947? A. Yes.

Q. Can you state the price which you paid in such purchases during October, 1947?

A. Well, as it has been previously testified, the market ascended, as it were, to, say, 85-cent level for clusters, and maintained itself steadily at that figure throughout October.

Q. Did it maintain itself steadily through November?

A. Yes, I would say through the entire month.

Q. Is that the market for prime quality hops?

A. Yes.

Mr. Kerr: That is all.

(Testimony of Ralph E. Williams, Jr.)

Cross-Examination

By Mr. Dougherty:

Q. How long have you been a partner of Williams & Hart?

A. Since my father's death in 1940.

Q. In 1940? A. Yes. [366]

Q. Did you personally handle the purchase of Mr. Geschwill's 1947 clusters?

A. No, I didn't handle it. It was handled by our field man.

Q. Mr. Hart handled that transaction, did he not?

A. No, he was ill in Palm Springs and subsequently passed away.

Q. You said, I believe, that a picking machine, such as used in Mt. Angel in 1947, would have a tendency to remove infected cones. Would it be your opinion that small nubbins, perhaps as large in size as an eraser on a pencil, might spring out?

A. I would say not. I would say no. I didn't see the operation of the machine in 1947, as to what modification they made from the standard type of the Danshauer machine. Machines are developed and are changed each year and, in fact, the owners many times make improvements, so I couldn't state definitely.

Q. You did not, in 1947, examine their operation very closely? A. That is right.

Q. Do you prepare the contracts which you make with hop growers?

(Testimony of Ralph E. Williams, Jr.)

A. They are prepared under my immediate direction, yes.

Q. Is that on a regular form of contract?

A. Well, yes, it is. It depends on the individual deal, whether it is just in the form of a purchase order or possibly just an exchange of correspondence, but we do have a form which we call our sales contract form, yes.

Mr. Dougherty: Thank you. [367]

Redirect Examination

By Mr. Kerr:

Q. Your firm, Williams & Hart, bought 35 bales of Oregon late clusters November 15, 1947, at 86 cents a pound. Do you recall that?

A. I don't know. If you had the grower's——

Q. Herbert Aylworth. A. Yes.

Q. On October 30th did your firm buy from De Yarmon Bros. 41 bales of such hops at 85 cents a pound? A. How many bales?

Q. 41? A. Yes.

Q. These were both spot purchases ?

A. Yes, but the second one was surplus over and above our floor contract that we had with the grower.

Q. Do you recall whether or not on October 24th your firm bought from Luford and Weber 280 bales of Oregon clusters at 86 cents a pound?

A. Yes, that was likewise surplus over and above the contract.

(Testimony of Ralph E. Williams, Jr.)

Q. That was also a spot sale, was it?

A. Yes.

Q. Did you, between October 21st and October 23rd, buy hops from William Krebs, Oregon clusters? A. Yes. [368]

Q. Do you recall the price paid for those?

A. It was 85 cents base for eight per cent hops. I think the price ran from 84 to 87 cents, something like that.

Q. Did that total quantity exceed 800 bales?

A. Yes.

Q. With respect to all 800 or 850—Do you recall that there were actually 856 bales? Do you recall the exact quantity?

A. No, I don't recall the exact quantity.

Q. The floor price for all was 85 cents, is that right?

A. I wouldn't say it was the floor price.

Q. The base price?

A. The base price; that was the base price.

Q. Those, again, were spot purchases, were they?

A. Yes.

Mr. Kerr: That is all.

Recross-Examination

By Mr. Dougherty:

Q. These sales that Counsel has inquired about, were any of those hops, at the time you bought them, under contract to another dealer?

A. No.

(Testimony of Ralph E. Williams, Jr.)

Q. Were any of those hops affected in any extent whatsoever by mildew? A. No. [369]

Q. Not one touch of mildew?

A. It would be a question of degree. In an 850-bale lot, probably would be.

Q. Largely a question of degree? A. Yes.

Q. Were any of these hops covered by a recorded chattel mortgage?

A. Yes, the ones that I indicated were surplus.

Q. Was that chattel mortgage made to you?

A. Yes.

Q. Were any of the others covered by chattel mortgages to any other dealers?

A. No. Otherwise they would not have been on the market because the dealer would have taken them himself.

Q. Had any of those hops ever been rejected by another dealer under a purchase contract?

A. Obviously not.

Mr. Dougherty: Thank you.

(Witness excused.)

Mr. Kerr: Does the Court desire to continue at this time?

The Court: We will go on until 5:30.

Mr. Kerr: May I inquire as to when we will recall the two witnesses concerning the examination of the samples?

The Court: That will have to be tomorrow. [370]

ROBERT OPPENHEIM

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. Robert Oppenheim.

Q. Where do you reside?

A. New York City.

Q. What is your occupation?

A. I am President of Hugo V. Loewi, Incorporation, engaged in the hop business.

Q. Is that the concern which is the defendant in this action? A. Yes, sir.

Q. How long have you been connected with that concern? A. Since September, 1900.

Q. What is your present connection with it? Are you an officer of it?

A. I am president of the present corporation.

Q. How long have you been president of the corporation? A. Since 1930; July 1, 1930.

Q. Is the present corporation the successor of some previous organization?

A. It is the successor of Hugo V. Loewi, Inc., in 1920.

Q. Was that, in turn, the successor of another organization? [371]

A. It was the successor of Loewi & Sons Company.

(Testimony of Robert Oppenheim.)

Q. How long has that concern and its predecessors in interest been engaged in the merchandising of hops? A. Since 1868.

Q. To your knowledge, is there any other existing organization which has been in that business as long a period of time?

A. We claim to be the oldest hop merchants in the United States, and have never had that claim disputed.

Q. What is the nature of the business of Hugo V. Loewi, Inc.?

A. We sell hops to breweries or to exporters, and buy them on the Pacific Coast from growers and dealers, occasionally. We are hop merchants, in other words.

Q. How long have you been engaged in the hop industry in any capacity?

A. I started in 1900 as an office boy and, after a few years, I took over inspecting and shipping; and when the corporation was first organized—when the first corporation was organized I was Vice-President and after the death of Hugo V. Loewi I became president of the present corporation.

Q. You said you inspected hops. Is that correct?

A. Many thousands of bales.

Q. What training or experience had you had in inspecting hops?

A. Well, actually, first I had to learn from the inspector we had when I entered there as an office boy, and, after his death, I took over the inspecting

(Testimony of Robert Oppenheim.)

of the hops and inspected every bale [372] of hops that came into our place in New York City before re-shipping them to our customers.

Q. Did you serve as assistant to the firm's hop expert?

A. Well, I couldn't answer that. I was just a boy in those days, you understand.

Q. Did you succeed that hop expert?

A. Yes, sir.

Q. Then you were the firm's hop expert. How many bales of hops would you say were handled per year by your firm?

A. Well, we handled an average of around 25,000 bales prior to prohibition, per annum.

Q. Did you yourself inspect those hops?

A. I wouldn't say I inspected them all, but I think I inspected most of them. In those days a great many of them were New York State hops. I used to handle ten or twelve thousand bales per year for export to London.

Q. When did your firm commence handling Pacific Coast hops?

A. We commenced handling Pacific Coast hops in 1900 when I first joined the organization, when I was first there as a boy.

Q. How long have you been inspecting Pacific Coast hops for the firm?

A. Well, I would say probably—it is just my guess, but I would say about around 1905 I started inspecting without any supervision and later on,

(Testimony of Robert Oppenheim.)

when we got other people, then I quit that part of the business. [373]

Q. Who now inspects samples of hops submitted to your New York office?

A. We have a man by the name of William P. Sherill as our hop inspector or expert, if you want to call him such.

Q. Do you inspect any hops now?

A. Oh, I would look at samples of them. I do not personally inspect hops. I have a lot of other things to do.

Q. You examine samples?

A. Yes. I examine most samples. I might say in this connection that our business is more of a one-man proposition. I am the head of it and while I have assistants, a lot of the buying and a good part of the selling and financing and so forth goes through my hands.

Q. Are any hops rejected by your firm without your inspection of the samples?

A. I would say no, except that we might buy some hops from dealers on the local market and if they did not run up to the samples submitted our inspector would throw them out—throw out a damaged bale; or if their color was muddy or something like that, trifling matters.

Q. Did you personally inspect the samples from Fred Geschwill's late cluster hops? A. I did.

Q. Where did you get those samples?

A. They were sent to our New York office, our

(Testimony of Robert Oppenheim.)

office which is in [374] New York, by Mr. Paulus, our Oregon agent.

Q. Did you personally inspect those samples?

A. I personally examined the samples.

Q. Who, in fact, determined that they would be rejected? A. I did.

Q. Does your firm sell hops to breweries?

A. Yes.

Q. Do you personally handle that end of the business?

A. Part of them; possibly a third of our sales are handled by me personally to breweries; maybe more.

Q. Are you a member of any brewers' trade association?

A. Yes, at the present time I am Associate Director of the United States Brewers Foundation. It has allied or associate members representing the various allied industries, and for this past year I have been Associate Director representing the hop trade.

Q. Did you serve as a dealer-member of the hop control board?

A. Yes, from its inception until it was disbanded; seven years.

Q. Do you have any connection with any growers' organization, hop growers' organization?

A. I am a Director of the Canadian Hop Growers, Limited, which raises some four hundred odd acres of hops in British Columbia.

(Testimony of Robert Oppenheim.)

Q. What is the usual or average production in bales of that operation?

A. That crop runs about 2500 or 3000 bales, the normal yield. [375]

Q. When was the first time you visited hopyards on the Pacific Coast?

A. I think, if my recollection is correct, it was 1908. It might have been a year or two later.

Q. Has it been your annual practice since that time to visit the yards frequently?

A. Excluding the years, the thirteen years, of prohibition, I have averaged two to four trips a year to the Pacific Coast.

Q. Did you make such a visitation to the hop-producing areas in Oregon in 1947? A. I did.

Q. What time in the year was that?

A. Well, I presume you are referring to the trip I made in either the end of July or early August, 1947. I was out here when the downy mildew infestation was at its height.

Q. You observed the downy mildew conditions in Oregon, in the Oregon hopyards?

A. Mr. Paulus or his assistant drove me from Portland down to Eugene and various of the districts in between.

Q. What was the condition as to downy mildew infestation in the Oregon yards as you observed it at that time?

A. From my observation, it was the first time in the history of the hop business that we had a

(Testimony of Robert Oppenheim.)

downy mildew infestation in yards when they were coming into bloom or burr, the new cone stage. We have had plenty of other attacks. The first attack I saw, I think, was in 1936. It did very serious damage to the crop. A great many of the vines were totally damaged and did not recover; others put out new arms and produced hops that were not affected by the downy mildew. That infection had disappeared so when the hops were picked they were sound hops.

Q. How did the condition as you observed it in the 1947 crop, in the Oregon yards, I should say, differ from the conditions you have just described?

A. I think I just told you that. The hops were attacked in the bloom stage or burr stage and showed serious damage by downy mildew.

Q. On the basis of your observation of hop-producing areas since 1908, state whether or not the conditions as you observed them in respect to downy mildew in Oregon in 1947 were unusual?

A. Yes, they were. They had never occurred before. I think I so stated that, Mr. Kerr. They were attacked at the blooming time, and some damage ran well into the time that hops were picked. This downy mildew worked in so many ways around the state that I couldn't say, because I am not qualified to say that. I am only giving you the results of my personal observation at that time.

Q. Did you see yards in 1947 in Oregon which were not affected by downy mildew?

(Testimony of Robert Oppenheim.)

A. Yes. I can particularly remember the Lakebrook yard which we had under contract with Livesley & Company was practically [377] free of downy-mildew damage.

Q. Did you have a contract with Livesley for the Lakebrook production?

A. Yes, had the entire crop under contract.

Q. Were those late cluster hops?

A. There were some fuggles and some clusters, mixed; there were both.

Q. Did you accept the 1947 crop of cluster hops tendered to you under the contract covering the Lakebrook yard? A. Yes.

Q. It has been said here, Mr. Oppenheim, that the term "prime quality" as used in the hop trade means average quality in some area for a particular year. State whether or not in your opinion that is correct?

A. I would hate to go to my customers and try and deliver hops on that basis, because a prime hop is a prime hop, whether grown in 1946, 1940 or 1945 or any other year. Prime hops, in other words, in my opinion, are normal healthy hops, free of disease, properly handled at the time they are picked until they are in the bale. That would be my simple-minded way of defining a prime hop. That applies to 1948 and 1950 and 1930 and any other year.

Q. Does the hop trade use the term "prime quality" as meaning an average quality in an area during a year? A. No, sir. [378]

(Testimony of Robert Oppenheim.)

Q. Is the term "prime quality" as used in the hop trade standard; that is, it is uniform from year to year?

A. Has been ever since I was a boy, a few years ago.

Q. On the basis of your experience in inspecting and examining hop samples throughout the years, Mr. Oppenheim, would you say that whether a particular sample of hops is made up of normal healthy hops, grown to maturity, and properly handled, may be readily determined?

A. Yes, by smell; and when I say "smell" I mean odor, flavor.

Q. When the term "smell" is used in the hop industry, that means what?

A. Fragrance of the hop.

Q. And when the term "flavor" is used, that means what?

A. Flavor is the same thing. I wouldn't differentiate between the flavor of a hop or the odor of a hop.

Q. What has the quality to do with a good colored hop with respect to whether or not it is of prime quality?

A. I think that has been clearly brought out by the witnesses and I would agree with their definition—even color, green or greenish or a yellow hop.

Q. Are those the colors or variations that distinguish them as healthy hops? A. Yes.

Q. Or mature hops? A. Yes. [379]

(Testimony of Robert Oppenheim.)

Q. How would maturity or lack of maturity affect the color or quality of a hop in determining whether or not it was of prime quality?

A. You are asking two questions. Maturity or lack of maturity, which do you want me to answer?

Q. Say, lack of maturity.

A. What I would designate as an immature hop would not have as strong a flavor as a fully matured hop; would be wanting in flavor, maybe on the watery side, rather having a strong hop odor.

Q. Would the appearance of the hop materially affect merchantability?

A. We sell all of our hops, I would say, on appearance and samples which we submit to the customers for their approval.

Q. That is, your sales to breweries, is that right?

A. Yes; and, of course, we do some business with dealers, exporters, and they buy the same way.

Q. Do you make any purchase from growers under so-called term contracts or contracts for future delivery? A. Yes, sir.

Q. Are those purchases ever on the basis of a chemical analysis of the hops?

A. Never. I might add, we don't sell them on the basis of chemical analysis, either.

The Court: Adjourn until tomorrow morning at 9:00 o'clock.

(Thereupon at 5:30 o'clock p.m. an adjournment was taken until the following day.) [380]

(Testimony of Robert Oppenheim.)

(Court reconvened at 9:00 o'clock a.m., Thursday, January 27, 1949.)

Direct Examination
(Continued)

By Mr. Kerr:

Q. To your knowledge, are Oregon cluster hops graded, as to whether or not they are of prime quality, in the hop industry, on the same basis as California or Washington hops are graded?

A. Yes.

Q. And on the same basis as foreign hops are graded? A. Yes.

Q. State whether or not the standards of prime quality are applied uniformly throughout the United States as to all hops? A. They are.

Q. Reference has been made during the course of the trial to fuggle hops under contract with Mr. Geschwill in 1947 to Hugo V. Loewi, Inc. Did your firm accept Mr. Geschwill's 1947 fuggle hops?

A. We did.

Q. What price did you pay for them?

A. I believe $1.00 per pound because they were seedless.

Q. Was that the contract price?

A. Yes, sir.

Q. Did you take him the full tendered delivery of the fuggles? A. We did. [381]

Q. At the full contract price? A. Yes, sir.

(Testimony of Robert Oppenheim.)

Q. Do you recall approximately the date when they were taken in?

A. I would have to refresh my mind; sometime in September, I believe. The evidence shows it, I think.

Q. 1947? A. Yes.

Q. What samples of the Geschwill 1947 cluster hops did you receive in New York?

A. To the best of my recollection we received one sample by airmail and one sample by regular mail or express, representing the first samples taken, and then three samples came in later, and at some time still later tenth-bale samples were sent up by Mr. Paulus.

Q. Did you personally see all of those samples?

A. Yes.

Q. Did you personally break them open and examine them? A. Yes, sir.

Q. On what basis did you reject the Geschwill clusters in 1947?

A. Mainly because of the excessive amount of blighted hops in them.

Q. Was it on the basis of these samples that you have described? A. Yes.

Q. Did you make that rejection personally?

A. Yes, sir.

Q. Will you describe the samples on which you based your rejection.

A. I don't quite understand the question.

(Testimony of Robert Oppenheim.)

Mr. Kester: May I inquire? Does this make this witness a witness on quality, now?

The Court: I don't know about that. Go ahead. Don't be interrupting.

(Question read.)

A. You mean the physical size or the characteristics? I don't quite understand.

Q. (By Mr. Kerr): Whatever factors you employed in deciding to reject the hops.

A. Well, the samples I think speak for themselves. They contained a great many blighted hops, so-called nubbins or cones that were damaged by downy mildew, and, as I stated yesterday, I do not consider any hops prime that are diseased and blighted with downy mildew.

(Answer read.)

Q. Did those samples show the effects of downy mildew? A. Yes, sir.

Q. Will you describe those effects as they appeared in these samples when you saw these samples. A. I think I did, in the previous answer.

Q. Will you describe them again? [383]

A. The samples contained an unknown percentage, because we did not pull them apart to determine what percentage, but they showed on the face of them a great many blighted hops; on the face of them it was apparent and on the edges.

Q. Were the samples of this color?

A. The color was reasonably good outside of the

(Testimony of Robert Oppenheim.)

damaged hops. The undamaged cones were of nice color.

Q. But, including the damaged cones, were the samples of good color? A. No.

Q. Why not?

A. Because they were mottled by the damaged hops; they were of uneven color. There were green hops that were perfectly free of disease and also blighted hops that were diseased.

Q. Were the hops in the samples fully matured?

A. Those cones that were undamaged were; the others were not.

Q. That is to say, the damaged cones were not fully matured?

A. Could not possibly be; had never had a chance to mature.

Q. Were the hops in the samples of sound condition?

A. The same answer applies. The healthy cones were in sound condition; the unhealthy cones were not.

Q. Were the hops in good order and condition?

A. I again state the same answer; they were not, for the same reason.

Q. What was your own judgment at that time as to whether or not [384] these hops had been properly dried and cured?

A. I would say that the curing and drying was okeh; nothing wrong with that. The hops were neither slack nor over-dry.

(Testimony of Robert Oppenheim.)

Q. What with respect to the baling of the hops?

A. That I couldn't tell from the samples without seeing the actual bales.

Q. Could you tell whether or not the hops were free from damage by vermin, as far as the samples were concerned?

A. By vermin, you mean——

Q. By the term "vermin" as used in the contract.

A. I would say they were free.

Q. By "vermin" as used in the contract you mean what?

A. Lice damage or red spider damage.

Q. Including damage by mice or rats?

A. Well, you never find any damage by mice or rats in fresh hops. You only find that in old hops.

Q. Were the hops in the samples that you saw prime quality hops?

A. You mean all the hops or part of them?

Q. These samples of hops that you saw.

A. They were not prime for the reasons which I have already stated.

Q. Do you recall the occasion when you notified Mr. Paulus that some of the samples looked better than others? A. Yes.

Q. Would you explain the circumstances of that statement by you [385] to Mr. Paulus concerning those particular samples?

A. As I remember it, when the thirteen tenth-bale samples were received we went through them very carefully in the hope of finding some hops of

(Testimony of Robert Oppenheim.)

quality which we might be able to use, and we picked out three samples as being brighter in color and showing on the samples less mildew damage.

We, therefore, suggested to Mr. Paulus that if he could find hops fully equal to those three bales and containing no more or further mildew damage, we would be willing to take them in.

Q. Were those three samples prime quality, sample of prime quality hops? A. No, sir.

Q. Do you now recall those particular samples?

A. The sample numbers that have been mentioned in court. I think they were 70, 100 and 130, but I wish you would check on it because you have the records there.

Q. Do you recall the time when you noticed those samples looked somewhat better than others?

A. Pardon me?

Q. You are now being handed Exhibit No. 23. Are the three samples of the bales referred to in that exhibit the ones you have just mentioned?

A. Yes, sir. Could I read for the Court what I said in this letter? [386]

Q. Yes.

A. "Confirming wire to you today in reference to the tenth-bale samples of Lot 79, Geschwill seedless, we have gone through these samples very carefully.

"We find that all of them show many blighted burrs and the quality of none of the hops is prime. However, we find that samples of bales 70, 100 and

(Testimony of Robert Oppenheim.)

130 are decidedly better quality than the other ten samples. We are satisfied to accept delivery of any hops which run no worse than these three samples, provided they do not show more blighted burrs, but we certainly cannot accept any hops in the lot which run poorer.

"We therefore instruct you to either arrange with the grower to re-inspect the hops and take delivery of those like the three samples, or to reject the entire lot and demand refund of our advances."

That is signed by me, personally.

Q. What is the date of that letter?

A. October 21, 1947.

Q. Did each of the three samples referred to in that letter show damage by mildew?

A. I so stated in this letter.

Q. And is that the fact? A. Yes, sir.

Q. In rejecting hops, does that make it necessary for you to replace the hops rejected? [387]

A. It all depends on our position at that time, but we had to replace hops in 1947 because of the blighted condition in the hopyards in the State of Oregon on which we had contracts.

Q. How would you replace those hops? By spot purchases?

A. When we needed hops, we would go in the market and buy them on spot.

Q. Will you examine Exhibit No. 20, which is being handed you by the Bailiff, specifically the

(Testimony of Robert Oppenheim.)

paragraph in that telegram relating to the Geschwill hops. Will you read that paragraph to the Court?

A. You mean the first paragraph?

Q. No, the paragraph relating to the Geschwill hops.

A. Excuse me until I find it. You want me to read it?

Q. Read it, please.

A. I think this is what you refer to: "Sample 79—" That is the Geschwill hops.

"These hops fair quality but not prime delivery. At what price can you settle with grower?"

Q. Is that the only reference in that paragraph to the Geschwill hops?

A. In the first paragraph it says——

Q. Referring now to Exhibit 19.

A. In the first paragraph, "Note that Geschwill selects 85 cents on his 130 bales with clusters with the 10-cent premium for seedless." [388]

Q. Will you explain what you meant by "fair quality" as used in Exhibit No. 20?

A. His samples showed some sound hops greenish in color and probably, if they had been entirely free of blight, they would—I would have said they would have been a good, prime hop; they were not as badly blighted or as red as some other hops which I had seen some other samples of, Oregon hops.

Q. In 1947 did you see many samples of blighted hops, Oregon hops?

(Testimony of Robert Oppenheim.)

A. Well, I would say at least two out of four, maybe three out of four samples showed evidence of blight, some very serious, some in varying degrees.

Q. Some of them showed worse blight than Geschwill hops? A. Oh, yes, decidedly.

Q. And did other show less blight?

A. Some samples showed practically no blight; otherwise, we would not consider it a prime hop.

Q. Did you see samples of 1947 Oregon cluster hops which graded prime quality? A. Yes.

Q. What did you mean in that telegram (Exhibit 20), "At what price can you settle with grower?"

A. Well, we always try, when we have a contract with a grower, if possible, to arrive at some settlement that would be fair to him and, at the same time, not too great a penalty to us because, after [389] all, we buy hops; we buy hops—we don't buy hops to stock up with; we buy hops for our customers and we try our best to dispose of the hops which we have under contract.

Q. Could you have disposed of these 1947 Geschwill cluster hops to brewers as prime quality hops?

A. No. We would have to make a new sale on them. We couldn't deliver them on the outstanding contract with the breweries. We might have been able to have sold them on actual samples at some later date, but we certainly could not deliver them to our customers on their advance purchases.

(Testimony of Robert Oppenheim.)

Q. You contract in advance with breweries, that is, make future contracts, do you?

A. Our general method of doing business is to buy and sell in a fair balance. We usually contract a few more than we sell because we have to have a little safety on our position. I mean, we do not take a speculative position; we do not buy hops on speculation. We buy and sell hops. We are dealers, not speculators.

Q. Was the rejection of the Geschwill hops for the reason that the market value of prime quality Oregon late cluster hops had declined?

A. Certainly not. I think the record of market transactions and market reports shows there was no sign of any decline in the market in September and October when we started to complain about the Geschwill quality. My instructions to Mr. Paulus were that [390] we would take in any hops that were prime but would not take in any damaged hops on prime contracts without further consideration, but we definitely took in any hops tendered to us as prime hops, if they were. We took in the Geschwill fuggles without any question. That is a case in point.

Q. I didn't understand.

A. The fact that we took in the Geschwill fuggles, I say, without any question is a case in point.

Q. Did you reject 1947 Oregon late cluster hops under contracts calling for a substantially lower price than the Geschwill contract?

(Testimony of Robert Oppenheim.)

A. We certainly did. We had a lot of contracts at 50 cents a pound which we rejected.

Mr. Kester: May I suggest that we attempted to inquire of defendant's witnesses on deposition and counsel instructed his witness not to answer for the reason that they claimed then that any transactions with other dealers or with other growers were entirely incompetent, irrelevant and immaterial. Do I understand that the subject has not been opened up so that we are now permitted to inquire on that and to inspect all of their records with respect to their transactions with other growers?

The Court: I don't know. Let Counsel finish his examination and we can develop those questions later.

Q. (By Mr. Kerr): Did you notify Mr. Paulus that the Geschwill [391] hops were unsatisfactory, after you examined the first sample?

A. I certainly did. I think the letters show that.

Q. I believe the record shows you instructed Mr. Paulus to obtain tenth-bale samples?

A. Correct.

Q. What is the general practice of your firm with respect to obtaining tenth-bale samples?

A. Well, that is the normal practice in the hop trade. Hops are inspected and graded and tenth-bale samples are drawn.

Q. In notifying Mr. Paulus that the so-called type samples, the first samples you received, were

(Testimony of Robert Oppenheim.)

not prime quality, and to reject them, did you intend not to take tenth-bale samples thereafter?

A. No, I don't see how we could, in normal practice, reject hops without giving them a complete inspection to see if there were any better hops in the lot than the earlier samples indicated.

Q. What was your purpose in notifying Mr. Paulus on the basis of the early type samples that he should reject the Geschwill clusters, or that you were rejecting the Geschwill clusters?

A. We do that with all hops. The normal practice is for Mr. Paulus in this state, and our buyers in other states, to send us samples, so-called early samples or type samples or representative samples of the crops as they are baled. Otherwise, we would have no idea of the quality of the crop, and when I say [392] "crop" I mean the entire Pacific Coast.

We then look at the samples when they come in. If any of them do not meet the contract specifications, in our opinion, we so notify our buyers. That is the normal practice I think with all hop buyers. I cannot speak for them, but I know that is the general practice in the trade.

Q. The Bailiff will hand you Plaintiff's Exhibit 24—No, no. 21 in this case. Will you read, I believe it is the second paragraph, the second paragraph after the first line there?

A. "Before answering any——"

Q. Just a moment. What is the date of that letter? A. September 22, 1947.

(Testimony of Robert Oppenheim.)

"Before answering any of your letters in reference to any specific lot, let me state that we will take in, in due course of business, all hops, either fuggles or clusters, which grade prime, but we will not take in any hops which run off-grade until each and every lot is separately inspected and graded and we have tenth-bale samples from you to show us what we are getting. It is not a question of the good will of any particular grower, as we will try in every way to cooperate with both you and the grower, but we are not going to accept a lot of hops which we cannot deliver to our customers."

Do you want me to continue?

Q. I believe that is all that does not refer to some other contract. [393]

A. The next paragraph refers to another contract.

Mr. Dougherty: May I inquire as to the exhibit number?

Q. (By Mr. Kerr): Will you state the exhibit number which appears there?

A. Exhibit 24, it shows here; Plaintiff's Exhibit 24, on the bottom.

Mr. Dougherty: Will you read over at the side where it says, "Civil 4082?"

A. There are two things here, Plaintiff's Exhibit 21, No. 4082, and Plaintiff's Exhibit 24, No. 4083. There are two numbers. I have just noticed that. Do we correct it?

Q. (By Mr. Kerr): Do you hold the broker

(Testimony of Robert Oppenheim.)

responsible for the samples which he procures and submits to you?

A. Maybe I had better explain it a little before they begin asking me, too. Samples are submitted to us and, if we feel they are of satisfactory quality, it is then up to the buyer, our buyer, to inspect the lot, the hops of that sample, on the split he has left of the sample, and if they don't run up to the sample, then he has to so notify us and submit other samples for our final approval. We rely on his inspection and judgment about it.

Q. Do you hold the broker responsible for a lot of hops involved being fairly represented by the samples which the broker sends to you?

A. Generally speaking, yes, but there may be hops in the lot [394] which he has not been able to sample that run differently than the original samples. We would not hold him responsible for that. That is something that could happen.

Q. You are familiar, are you, with the method by which tenth-bale samples are taken by buyers?

A. Yes, sir.

Q. Is that the method you rely upon in evaluating the samples you receive?

A. We expect that the tenth-bale samples which are sent us for inspection fully represent the hops. If there is a difference in grade, it is usually shown, so many hops of this sample and so many hops of that sample. The buyer and his men grade and inspect or, rather, inspect and grade them and submit samples to us that represent the hops.

(Testimony of Robert Oppenheim.)

Q. Your firm pays its brokers on a commission basis? A. Yes.

Q. So that the more hops that they buy for you, and that you accept, the greater brokerage they receive, is that true? A. Correct.

Q. Do you find that has any influence upon the brokers in attempting to get you to accept hops?

A. No, except that the brokers, if there are any hops in dispute as to quality, they always try to urge us to make settlement, which would be a natural thing to do, from many points of view, including the brokerage they might get. [395]

Q. When you refer to a settlement, Mr. Oppenheim, what do you mean?

A. It means if we reject hops for quality and then buy them back at some lower price—I believe that would be correct legally.

Q. Is a subsequent purchase considered a transaction on the original contract?

A. I believe it is so considered.

Q. Is that the way your firm considers it?

A. We have always called it, in our opinion, a settlement of an outstanding contract, but I believe, actually, if we reject hops and then buy them back it would be in the nature of a new transaction, wouldn't it?

Q. Do you know what the prevailing market price to growers for Oregon 1947 late cluster hops was in October, 1947?

A. Eighty-five cents for prime hops, 8 per cent leaf and stem.

(Testimony of Robert Oppenheim.)

Q. Was that the case on or about October 16, 1947? A. Yes, sir.

Q. Was that the case on or about October 30, 1947? A. Yes, sir.

Q. What was the market price for such hops during the period of November, 1947?

A. The market stayed firm, according to the market reports which you have already shown, at 85-cent level.

Q. Does your firm make spot purchases from growers of hops not [396] of prime quality?

A. Yes, everybody does.

Q. Is there an outlet for such hops?

A. There are always certain buyers looking for what we call bargains at a lower price, and there is also certain export business that comes in at different times, and there is always a buyer—I don't say always, but there are always buyers at lower levels for below prime quality hops.

Q. In referring to buyers do you mean breweries? A. Consumers or handlers of hops.

Q. Are some of those hops used for purposes other than direct brewing trade?

A. Yes, but to a very limited extent; only a fraction of one per cent used for anything but beer.

Q. What are the other uses?

A. In the drug and chemical trade.

Q. Are some of them taken for lupulin?

A. They were during the war. I don't think since the war there has been any serious demand for

(Testimony of Robert Oppenheim.)

lupulin, and that has been supplied by commercial lupulin growers from hops grown by certain growers in certain sections of the country.

Q. What would you say the situation was with respect to supply and demand?

A. There was a shortage of prime hops at all times, and there was a buyer for any hops that we could lay our hands on. It was [397] a question of buying rather than selling hops during the wartime, because there were no hops available from Central Europe for export trade.

Q. Reference was made during the testimony of another witness yesterday or, rather, reference was made to your firm, Hugo V. Loewi, Inc., as one of the big three dealers in hops in the United States. What is the fact?

A. My friend, Mr. Mike Walker—I have known him for many years—paid me a compliment in saying that we were one of the three large handlers of hops and dealers. There are two large concerns. I am in the very small, medium-sized class, I would say.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. You say there are two large firms. Which are they?

A. John I. Haas, Inc., Washington, D. C., is one and S. S. Steiner, Inc., New York City, is the other.

(Testimony of Robert Oppenheim.)

Q. Are you affiliated with either one of them?

A. No, sir.

Q. Do I understand, Mr. Oppenheim, that practically all the hops in the United States come from the Pacific Coast?

A. With the exception of 1500 or 1800 bales grown in New York State, yes.

Q. Of the Pacific Coast production, about how much comes from [398] Oregon?

A. You mean in reference to the total production?

Q. Yes.

A. Can I give you the figures on all the Pacific Coast so you can get the complete picture?

Q. That would be fine.

A. I think in 1947—These figures are from memory and subject to checking. I believe the Oregon crop was about 83,000 bales. The crop in Yakima and the State of Washington was a little over 100,000 or thereabouts—107,000, I believe. I think the crop in California was 73,000 bales—possibly 3,000 or 3,500 bales in Idaho and 10,000 bales in British Columbia.

Q. Then, could one say that Oregon produced approximately one-third of all hops?

A. Well, a little less than a third; maybe 30 per cent. Begin that way, subject to correction.

Q. These hops from Oregon, where did they come from in Oregon?

A. Well, the main source of supply is in the

(Testimony of Robert Oppenheim.)

Willamette River Valley. I would say of 83,000 bales probably ten or twelve thousand came from the Grants Pass section and maybe a couple of thousand bales—I am not sure about these figures—from Eastern Oregon. That section just came into production. The balance came from the Willamette River Valley and a few scattering outside places.

Q. Do I understand that in 1947 you examined Willamette Valley [399] hopyards rather closely, rather carefully?

A. Well, we made a pretty fair trip around by automobile through the hop-producing section of the Willamette River Valley.

Q. Did you see any effects of downy mildew at that time? A. Plenty.

Q. Do I understand that downy mildew was quite widespread that year in the Willamette Valley?

A. Well, some sections were hit harder than others. As is always the case in any business of that kind, it always depended on the amount of dusting that was done by the individual growers.

There might be a very fine, well-dusted, clean yard—we call it clean on account of lack of downy mildew—maybe right here, and it would be surrounded by infected yards. It was a matter, in some cases, of the amount of energy in dusting put behind it by the individual grower.

Q. Did you examine Mr. Geschwill's yard?

A. No, sir. I never saw it.

(Testimony of Robert Oppenheim.)

Q. Do you remember seeing any of his hops?

A. Well, I was told, if my recollection is correct, I was at the St. Benedict's Abbey picking machine, which was put in by Mr. Danshauer whom I know personally, in 1947; it was just in operation at the time we got there, and Father Roberts took us through and we saw the machine work.

I have since been told, or my memory has been refreshed—If you [400] ask me were these Mr. Geschwill's hops and I had not been refreshed, I would have to say no, because it didn't mean anything to me, because they were picking fuggle hops and we were not interested—we were interested in the working of the machine rather than the hops.

Q. Would you say the machine was efficient in picking hops?

A. It is a very good machine. That is only as far as I would say because I don't know a thing about picking machines, you understand.

Q. You have testified, Mr. Oppenheim, about your problem in selling to breweries, and the way you conduct your business. Have you ever discussed that with Mr. Geschwill?

A. No; I never met Mr. Geschwill. The first time I have ever seen him was in court here, as far as I know.

Q. Mr. Oppenheim, as far as you know, Mr. Geschwill knows nothing about the way you conduct your business?

(Testimony of Robert Oppenheim.)

A. I wouldn't think he would know any more about it than you did up to date.

Q. Do I understand it is your opinion that no hop is a prime hop if it is affected by downy mildew?

A. You mean a ripe hop, a harvested hop?

Q. Yes.

A. Well, I would say that there may be, in a hop here and there, one little burr that is affected, but if there is any damage noticeable to the eye, any damage that shows on the sample, I [401] would say they are not prime hops.

I believe in any hop you could take a sample apart and, if you went through it very carefully, you might find where there has been disease; you might find an odd burr, maybe one out of a thousand. I wouldn't say they were affected by downy mildew damage.

Q. You did not ordinarily make microscopic examinations?

A. Never make microscopic examinations; never have. We do not.

Q. If you split open a sample and could see a touch of downy mildew there, would that be a prime hop?

A. No, I would say that would be possibly visible to the eye on breaking and all through the sample—if that would be the case, then there is a considerable amount of infection.

Q. Do you sell hops to breweries on contract?

(Testimony of Robert Oppenheim.)

A. Yes.

Q. Do those contracts normally specify the so-called quality of the hop? A. Yes, sir.

Q. Do those contracts contain the same definition which you insert in your growers' contracts?

A. No, I said we simply sell hops as good hops. We don't sell them on any written specifications of cleanly picked hops, properly cured, and so forth. We don't have in our contracts in recent years the usual 8-per cent or 6-per cent picking clause.

Q. So when you sell them to breweries, you sell them as good hops and not based on the pick, is that correct? A. Yes.

Q. You do not have, in your brewers' contracts, this language which appears in the growers' contracts? A. No, sir.

Q. Could you say, Mr. Oppenheim, whether or not in 1947 most of the hops on the Pacific Coast were under contract?

A. Well, I would say that possibly 90 to 95 per cent were either under contract or controlled by grower-dealers or dealers who grow hops of their own, or by the Co-op up in Yakima.

Q. Most of these contracts are called prime quality contracts?

A. As far as I know, all contracts are written as prime quality. It is more or less standard form. Of course, each contract has different variations, but they are all, generally speaking, the same form.

Q. About 95 per cent or thereabouts?

(Testimony of Robert Oppenheim.)

A. That is my guess. I don't know. I have to give you the figures the best I can. We have no actual percentages to go by.

Q. When you were in Oregon in August, 1947, going through the hopyards, what was your estimate as to the hop production that year?

A. I thought that a great many hops actually would not be picked. My estimate was somewhere around 60,000 bales for the state. That was my general estimate. Of course, I don't qualify as an estimator [402] except from my experience over many years. One year I am right and the next year I am wrong. Nobody in the world can guess a hop crop until it is in the bales. They are lots smarter than I am, if they can.

Q. After you had made your estimate that there would be an underproduction in Oregon, did you instruct Mr. Paulus to buy more hops?

A. I bought additional hops because I felt that some of the yards with which we had contracts would evidently fall under their contract amount on that date. By actual count, some few yards did not pick a bale. Others picked a half-crop; some picked three-quarters; some picked the total amount.

Q. So, in a sense, you were required to go into the market?

A. I had contracts on all hops to breweries. We are a concern of long standing and, regardless of the expense, we have to deliver hops to breweries, whether the market is up or down. I felt I needed

(Testimony of Robert Oppenheim.)

some additional hops for my deliveries to breweries, additional prime quality hops—Let me qualify that, if you please.

Q. Did you reject any hops on the contract in 1946?

A. I would say over a period of many years—Now, I would like to answer that a little more specifically.

Q. Please explain.

A. We have, in the course of our business career—I am talking of myself—never rejected hops in any quantity on the [403] Pacific Coast, except where bales are damaged or are overdried or something like that—we never have rejected any hops in any quantity on the Pacific Coast until 1947, but there was a reason for that.

It was the first time in the history of the hop trade—and I have been in it for forty-eight years plus—that we had downy mildew affecting the quality of the hops at picking time.

Never in the history of the hop trade have any quantity of hops been attacked or showed downy mildew infection such as those attacked in 1947, and that is the reason why our rejections in 1947 were considerable.

Q. As a matter of fact, Mr. Oppenheim, didn't you take in prime quality hops—I mean, didn't you take, under prime quality contracts, a large amount of hops in 1944 which were affected by mold?

A. I don't think so. My recollection is that we

(Testimony of Robert Oppenheim.)

had very little moldy hops. It is possible we might have taken in hops with mold, but in 1944 we had wartime conditions and we needed all the hops we could get or could lay our hands on. That is the thing that you want me to say; but when we have more demands for hops, we have to buy them, and we don't take them in as prime hops. We simply take them in because we need them for our customers.

Q. You would say, then, that your standards vary according to [404] the market?

A. No, the standard of quality does not vary according to the market.

Q. Talking about your practice now, when you need hops you take them in?

A. When you have an excessive demand for any commodity, whether it is hops or potatoes or anything else, and enough of the prime quality or first grade are not available, a buyer necessarily takes in other grades.

If your wife goes to the market and if she cannot get prime ribs of beef, she will take some off-grade. We have no Federal standards in hops, no governmental standards; but when there is a scarcity of commodities, people buy what they can get. That is the normal situation.

Q. You say there are no Federal standards?

A. There are no Federal Government grades or standards of hops, of the hop market, outside of grading for leaf and stem and seed content.

(Testimony of Robert Oppenheim.)

Q. Do hop men ever differ when they inspect hops? A. Oh, plenty of times.

Q. Opinions vary?

A. Yes, but, generally speaking, as I said yesterday, a normal hop that is properly cured and dried and free of disease—I think 99 out of 100 of them would pass that as a prime hop. There would be no differentiating on that. Maybe differentiate [405] when they are off-color or for smell or dirty picking or improperly cured, or something like that.

Q. As I understand it—Correct me if I am wrong—Did you consider purchasing Mr. Geschwill's fuggles and clusters as one transaction?

A. No. They were two separate contracts.

Q. In this connection, to refresh your memory, I should like you to examine Exhibit 27, if you will, please. You did take Mr. Geschwill's fuggles in at the contract price?

The Court: Go on with something else.

Q. (By Mr. Dougherty): As I understand it, after you had received one or possibly two split samples out of these 130 bales of clusters that we are talking about here, you considered that they were of fair quality, is that correct?

A. I think I read you the letter. If you want me to read it, I can read the letter again, but I have already stated that, have already answered that question.

Q. You asked Mr. Paulus at what price he could settle with the grower, is that correct?

A. Correct. It so states in the letter.

(Testimony of Robert Oppenheim.)

Q. Did Mr. Paulus report back to you?

A. I am not certain as to what he reported back, but I think something along the line that Mr. Geschwill would consider no concession in price. I don't know whether that is a hundred per cent accurate, but that is my impression of it. [406]

The Court: He will have to be excused for a little while, while I take up something else.

(Recess, during which the Court proceeded to the transaction of other business.)

Cross-Examination
(Resumed)

By Mr. Dougherty:

Q. A moment ago I asked you whether or not you considered the Geschwill fuggle and cluster purchases as one transaction, and for the purpose of refreshing your memory I should like to invite your attention to Exhibit 27. I believe it is the third paragraph. A. Yes.

Q. Is it correct to say, Mr. Oppenheim, that even though there were two pieces of paper, it was one transaction?

A. It was a transaction with one grower covering his fuggles and his clusters, and we had advances tied up in the clusters which we wanted to get back. Therefore, there is that connection. It is one grower, no question about that.

Q. How do you judge a hop? There has been some testimony about visual examination and tex-

(Testimony of Robert Oppenheim.)

ture and flavor and so forth. Is that the way you judge a hop?

A. Our normal procedure has been to open up a sample, break open the samples—sometimes they have been cleaned off on top, [407] as this letter says, the letter that you gave me—and see what it looks like. If it shows damage of any kind, from any disease or anything like that, why, then, we are ready to pass judgment on that phase of it at once.

As far as flavor goes, it is a question of rubbing them up, as the brewmaster testified day before yesterday, rubbing up the hops and smelling them. That gives you the flavor. If they off-flavor, you know that immediately, because the normal, healthy hop has a nice, sweet bouquet, when they are fresh, not like these samples here which are a year old and have lost their flavor. If they are dried out and are not quite at peak flavor, a hop man would recognize that immediately. If they are immature, they haven't got that pungent, strong flavor; might have what you would call a watery flavor because they have not fully matured; they were picked too green.

Outside of that, you use your eyes, and that comes from experience, as Mr. Ray testified yesterday. It comes from experience, from smell, from feel, and from looks. It is hard to write it down in books.

Q. Do hop experts ever disagree on intangible factors?

(Testimony of Robert Oppenheim.)

A. Only to a minor degree. On hops that are a little off-flavor, they might say it is not serious enough to affect the quality of the hop, but, even so, on minor variations I think the majority—I think the qualifications could be agreed upon by any competent hop men. [408]

Q. What is it in the hop that produces this flavor or bouquet?

A. Well, I would say there are two sources of that. One would be the lupulin and one would be the oil. There are certain oils in hops and the lupulin itself; both have something to do with flavor. That is why a scorched hop or a high-dried hop will lose flavor, because these oils have dried up and the lupulin has, to some extent, lost its flavor.

Q. This lupulin, is that a sort of a pollen in the hop?

A. Well, it is the yellow grain which you find inside. It could be described in various ways, but it looks like grains of sand about that size (illustrating).

Q. Did I understand you say, Mr. Oppenheim, that breweries never have chemical analyses made?

A. I didn't say that.

Q. I am sorry. Would you tell me what is the fact?

A. In some of the larger breweries today they have laboratories which analyze hops, but not a great many of them, and you must realize that there are only a scattering number of large breweries and

(Testimony of Robert Oppenheim.)

many, many more smaller breweries. Some of the smaller breweries haven't complete laboratories; but, as far as hops are concerned, I would say that four out of five breweries accept hops on tests such as we make rather than laboratory tests. There are some that do use the laboratory to back up their selection. They will go through ten samples and select two and they will check up with the laboratory to see which has [409] the better content and select one of these two for that reason. That is a matter of individual procedure test. For that reason there is a little difference. They are all human beings, just like we are.

Q. As I understood you to say, you could have sold Mr. Geschwill's hops if they were of fair quality?

A. We could have delivered them on the contract if they had been prime hops, without any question, and we might have sold them later in the year on an actual sample or spot sale, but we couldn't deliver them on the contract, or we would have had much difficulty.

Q. As a matter of practice, Mr. Oppenheim, not as a matter of opinion, would you say that a so-called prime quality hop is a good, merchantable hop? A. Correct.

Q. There has been some testimony about the market in September and October and November, 1947. Did you make spot purchases of any hops at that time?

(Testimony of Robert Oppenheim.)

A. Not to any material extent at that time. I don't believe we did.

Q. Do you know whether you bought any hops which were under contract to another dealer?

A. I don't think we did.

Q. Do you know whether or not at that time you bought any hops which had been rejected by another dealer? [410]

A. Not to my recollection.

Q. Did you buy any hops which were covered by chattel mortgage to another dealer?

A. That is the same answer as the one before. Necessarily, if they were under contract, they were covered by chattel mortgage.

Q. In 1947, under contract, did you take any hops which showed some wind whip?

A. I couldn't answer that without having to refer to someone else. I don't believe there was any material damage by wind whip in 1947 hops. Are you referring to Oregon or the whole Pacific Coast?

I think there was very little wind whip. Rarely has wind whip hit unless you have pretty heavy windstorms at picking time when the hops are matured, and the best of my recollection is that we had no such type of weather that would have bruised the hops. The arms of the hops sort of sway in the wind and hit each other and bruise. We had a lot of it in 1946, I believe it was, in Yakima.

Q. In 1948 was there any wind whip in Oregon?

A. Not to my knowledge or recollection.

(Testimony of Robert Oppenheim.)

Q. In 1947 or any other year, under these so-called prime quality contracts——

The Court: What is this insurance you have talked about? Who is the insurer and who is insured under such policy? Ask him that. You were talking about insurance. Didn't a witness [411] say something about hops being insured?

A. No, I didn't say that.

The Court: Being insured at harvest time?

A. No, I don't think so.

The Court: Did you pick that up anywhere in the testimony?

Mr. Dougherty: I believe a witness says "injured by wind whip."

A. That is right.

Q. In 1947, under your contracts with growers, did you take in any lots that showed some mildew?

A. Not as prime delivery at the floor contract price. We made some settlements with growers and took them in later on, at some differential in price.

Q. Is it accurate to say that under these contracts you are given the contractual privilege to take them at a reduction in price?

A. I couldn't answer that question. There might be some flaws in the contract, but I couldn't specifically state that I know what it is, without looking at the contract.

Q. Do I understand you to say you took no lots of hops at contract prices which showed some mildew?

(Testimony of Robert Oppenheim.)

A. As far as I know, I think that is a correct statement.

Q. As a matter of fact, wasn't every hopyard in Oregon in 1947 affected by mildew to some extent?

A. Well, I would say categorically no, but of course in any [412] hopyard any year you can always find a spray of hops or an arm of hops that might have been damaged, but it would be infinitesimal when compared to the entire crop. I wouldn't consider it damage.

Q. In other words, it is a matter of degree, is that correct?

A. I can't agree to that statement of yours; no, sir.

Q. Did you consider, Mr. Oppenheim, one or two samples sufficient to judge a lot of hops from 130 bales?

A. Well, it depends entirely on several factors. If they are all grown in what we call one yard of ten or fifteen or twenty acres, and particularly if they are machine-picked, where they run them through the machine in two or three days, I would say that there would be very little, if any, variation in those hops. There might be a few bales differ a little bit occasionally, but there would be very little variation, and normally any sample from the first bale or the last bale would come very close to representing the entire lot, reasonably close.

Q. Did I understand you to say you did not

(Testimony of Robert Oppenheim.)

think a lot of hops should be accepted or rejected until after a complete inspection had been made?

A. That is simply the procedure of the trade. I believe we are required to inspect hops. We cannot just reject them and say, "I won't take these hops." We have got to go through the form, necessarily, the form of looking at the hops. We have to inspect the hops and know they are the hops tendered to us. I think [413] that is a requirement or custom of the trade.

Q. To your knowledge, Mr. Oppenheim, did anyone who represented your corporation and who had authority to accept or reject the hops, Mr. Geschwill's 1947 clusters, ever inspect these hops in the warehouse at Mt. Angel?

A. I think that has been testified to, and they are much more competent to state it than I am. I have to go by the reports I get from Mr. Paulus in Oregon, who is my representative and in whom I have the greatest confidence.

Q. Did you give Mr. Paulus authority to accept or reject these hops, on his own judgment?

A. You are talking about the Geschwill late clusters?

Q. The 1947 clusters.

A. I gave him instructions not to accept them.

Q. As a matter of fact, he had had those instructions before the inspection was made?

A. Correct.

Q. Do I understand that the substantial defect

(Testimony of Robert Oppenheim.)

which you found in Mr. Geschwill's 1947 clusters was mildew?

A. Defect caused by mildew damage, downy mildew, to the hops on the vine, and it shows definitely in every sample.

Q. Was that your ground for rejection?

A. Yes, sir. Blighted hops, diseased hops,—that was the basis of our rejection.

Q. I believe you said, however, you were willing to take all [414] the hops that ran to sample from Bale 130, is that correct?

A. Not Bale 130; 70, 100 and 130, the three samples that were testified about. That is all that we thought ran a little better. We said in our letter that they contained considerable mildew damage but if there were no worse than that we would take these lots in. We were trying to arrive at some basis of settlement and get our money out, our advances, and satisfy the grower to some extent.

Q. I should like *to you* now, Mr. Oppenheim, to examine Exhibit 34-B. First, will you tell us what bale that sample is from?

A. Out of Bale 130 of the Geschwill cluster hops.

Q. Is that light adequate?

A. Very good here from that window. Do you want my opinion about it?

Q. Does that sample show any mildew damage?

A. Well, I would say on this break here that there are at least twenty or thirty small nubbins and blighted burrs showing.

(Testimony of Robert Oppenheim.)

Q. You were willing to take all of the Geschwill 1947 clusters which conformed to that sample, is that correct?

A. No, sir. I would like to add that on this other break it shows considerably less and looks a lot better, so it is a question. I say if the hops ran no worse than that sample, if they could find any bales that ran no worse than that sample, these three samples, excuse me,—and contained no more blight than shows on what I had seen in New York, we would be willing to [415] take them in but, as previously testified by Mr. Paulus, he had a conversation with Mr. Geschwill and his own people and they didn't think that the hops would run as good as this sample, any of them, and Mr. Fry testified yesterday, I believe, that the hops were false-packed and that he cut a sample out of one side and took a sample out of the other side and it showed much more mildew damage. There is no question; there is plenty of mildew damage in this sample.

Q. As I understood the testimony yesterday, that related to color, did it not?

A. I don't think so. My impression was that it related to color and blight and other qualifications of hops. I think he went into that rather carefully.

Q. Mr. Ray's testimony? A. Yes.

Q. Mr. Oppenheim, with reference to your telegram of September 18th where you said the Geschwill hops were fair quality and wanted to know what price the grower would be willing to accept,

(Testimony of Robert Oppenheim.)

you said I believe it was your desire to effect a fair settlement with the grower?

A. If we could do so, we do in every case with growers. It is not our desire to reject hops unless we have to.

Q. Subsequently, however, you said you were not interested in any compromise offer made by Mr. Geschwill.

A. Mr. Geschwill was refusing to consider any reduction in price, [416] if I remember the situation correctly, and we simply got to a point where we felt we could not come to any satisfactory settlement with him.

Q. Didn't Mr. Geschwill offer to take a reduction in price?

A. I believe Mr. Paulus so testified. I don't remember what it was.

Q. With reference to Exhibit 44, Mr. Oppenheim—— A. Yes, sir.

Q. ——were you notified that Mr. Geschwill was willing to enter into a compromise?

A. Only on this letter of December 2nd, 1947, which was considerably later on in the year.

Q. Yes, but had you told Mr. Paulus, your agent here, that you were not interested in that?

A. I think that is correct, as far as I remember.

Q. Did Mr. Paulus then advise you that Mr. Geschwill was considering the possibility of reselling the hops for the best price obtainable and bringing an action for the difference in price?

(Testimony of Robert Oppenheim.)

A. It states in this letter of December 2nd, Exhibit 44, yes.

Q. You then knew Mr. Geschwill was considering the possibility of reselling the hops?

A. I understood he was trying to resell them prior to that time.

Q. Was that acceptable to you?

A. Certainly it was acceptable to me. He could resell them at any time, on payment of our $4,000 advances; the hops would have [417] been released at any time.

Q. Upon payment of your advances?

A. Naturally. We are not going to let him keep our money, and would not release these hops unless he repaid that. That is the common business precaution anybody would take.

Q. Were you advised Mr. Geschwill was considering the advisability of bringing an action to recover the difference between the contract price and the selling price?

A. It so states in that letter. That is the advice we got, dated December 2nd. I can only repeat what is here.

Mr. Dougherty: Thank you, Mr. Oppenheim.

Redirect Examination

By Mr. Kerr:

Q. Mr. Oppenheim, what was the quality of the 1947 Yakima, Washington, crop compared with the quality of the Oregon 1947 crop?

A. I think the Washington crop was, generally

(Testimony of Robert Oppenheim.)

speaking, prime throughout the entire crop, with the exception of mishandling the hops, mishandled hops. That is my general impression, I think, up to date.

Q. What was the quality of the California 1947 cluster crop, compared to the Oregon crop?

A. I think the same answer would apply. They were generally a prime hop with a few exceptions, and mainly when they were [418] mishandled between the vine and the bale.

Q. Can a crop of hops be a good, merchantable hop and not be of prime quality?

A. I don't quite know what you mean by "good, merchantable hop", but they would have brewing value, no question about it.

Q. You said a prime quality hop is a good, merchantable hop? A. Yes.

Q. What do you mean by a good, merchantable hop?

A. Well, a hop that moves through normal channels of trade, I would say, would be a reasonable definition, but there are a lot of other hops that are salable at some price some place.

Q. In your opinion, then, a prime quality hop is a good, merchantable hop, is that right? By that you mean that a prime quality hop——

Do you refer to a good, prime quality hop as being a good, merchantable hop with respect to salability or the standard of quality of it?

A. Standard of quality would be the better definition, I would think.

(Testimony of Robert Oppenheim.)

Q. In 1947 were prime quality hops readily salable? A. Yes, sir.

Q. Would you say that of good, merchantable hops—would you say that all good, merchantable hops are necessarily prime quality hops?

A. I think on that quality definition—of course, many hops [418½] are sold that are not fully prime quality, but are off-grades, diseased or damaged because they sell at a lower price sometime during the course of the year, but they have been sold on samples; certainly not sold on contract.

Q. The Bailiff will hand you Exhibit No. 23, Mr. Oppenheim. Is that the letter that you referred to on cross-examination as containing your instructions to Mr. Paulus concerning the three samples?

A. Yes.

Q. Will you read that reference to the three samples, that particular paragraph.

A. "We find that all of them show many blighted burrs and the quality of none of the hops is prime. However, we find that samples of Bales 70, 100 and 130 are decidedly better quality than the other ten samples. We are satisfied to accept delivery of any hops which run no worse than these three samples, provided they do not show more blighted burrs, but we certainly cannot accept any hops in the lot which run poorer."

Is that all you wish?

Q. The Bailiff is handing you Exhibit No. 39, Defendant's Exhibit No. 39. Will you state the date of that letter?

(Testimony of Robert Oppenheim.)

A. September 15, 1947.

Q. Does the last paragraph of that letter relate to the Geschwill hops? A. Yes. [419]

Q. Will you read that particular paragraph?

A. Yes. "I am taking this definite stand on all deliveries, as we cannot afford to get tied up with high-priced hops which cost a lot of money and which are not salable. I will take all hops which run up to contract specifications, or reasonably up to contract specifications, but I am not going to load up with a lot of unsalable, poor hops."

Q. That was addressed to whom?

A. That was addressed to Mr. C. W. Paulus.

Q. Now, I am referring to Defendant's Exhibit No. 48. A. Is that a telegram?

Q. That is correct. That is a telegram addressed to whom? A. To Mr. C. W. Paulus.

Q. Will you read the portion of that wire relating to the Geschwill hops?

A. "Three samples Lot 79 Geschwill, quality poor, full of stems and blighted hops. Positively reject these hops. Don't settle with Geschwill on fuggles unless he returns advances on clusters. We instructed you not to take in any fuggle hops where clusters are involved until satisfactory settlements made. Ask you not to disregard our orders. Furthermore, instruct your office not to bud up samples. Geschwill samples looked nice on top because they are cleaned off and budded. They are terrible on

(Testimony of Robert Oppenheim.)

the break. We want samples to actually represent hops and not made like pictures." [420]

Q. Is it necessary, Mr. Oppenheim, in judging a sample of hops, to break it open to see the interior of it?

A. Well, the natural tendency of a man drawing a sample is to clean it off with his hands, so if there is anything wrong with the hop it does not show so much. We never look at the outside of samples. We break them in the center.

Q. Will you refer to Exhibit 30, Defendant's Exhibit 30? A. Yes.

Q. A letter dated September 26, 1947, is it not?

A. Yes.

Q. Addressed to Mr. Paulus? A. Right.

Q. Does the second paragraph refer to the Geschwill hops?

A. Well, I think it refers to all hops.

Q. Will you read that second paragraph?

A. "We confirm our instructions to you that you are not to accept any off-grade lots for our account. Where quality is doubtful, whether it is on cheap prices or high-priced contracts, we want you to inspect and grade the hops, and send us tenth-bale samples representing each grade. The final decision on rejection or acceptance will be made by us after we have examined the samples."

Q. That is the instruction you refer to as having been given to Mr. Paulus concerning tenth-bale samples? A. I think it is very clear. [421]

(Testimony of Robert Oppenheim.)

Q. Will you examine Exhibit 36, a telegram dated September 30th. A. Exhibit 26?

Q. That is a telegram, is it not, dated September 30th?

A. This is a telegram dated October 21st.

Q. Exhibit 26?

A. Our Exhibit 26. It is Exhibit 26.

Q. Does that refer to the Geschwill hops?

A. Yes.

Q. Read it.

A. "Received thirteen samples Lot 79 Geschwill crop. All samples show many blighted hops, but samples of Bales 70, 100 and 130 decidedly better than other samples. Willing accept any bales reasonably free of blighted hops and equal to these three samples. Reject balance account not being prime delivery."

Q. That again refers to the three samples you have testified to? A. Yes.

Q. Now, will you refer to the letter which has been handed you by the Bailiff. That is Exhibit 47, Defendant's Exhibit 47, is it not? A. Yes.

Q. That is dated October 3, 1947, and addressed to Mr. Paulus? A. That is right.

Q. Will you read the portion of it referring to the Geschwill [422] cluster hops?

A. There is a paragraph that refers to all hops in that same category.

Q. Will you read that?

A. "We confirm our wire to you today, referring

(Testimony of Robert Oppenheim.)

to your letter of September 29th wherein you mention that when inspecting the various lots which we have notified you are not prime, you were going to weigh these up if you could get some kind of an agreement with the grower that it was okeh to do so. However, we feel that, until we have come to a final decision on these lots, they should not be weighed as weighing them would imply that we were considering accepting these hops at some price. We stated in our wire that we positively refuse to make any commitments of this kind."

Q. Will you refer to Defendant's Exhibit 41, which I believe is a wire dated November 17th, addressed to Mr. Paulus. Is that correct?

A. Right.

Q. Will you read that wire?

A. This is a wire addressed to Mr. Paulus, dated November 17th: "Not interested Geschwill proposition. Suggest try interest Segal or Hughes this lot."

Q. What do you mean, "interest Segal or Hughes"?

A. If my memory is again correct, I believe that a lot of hops that we had rejected, seedless cluster hops, had been bought by [423] Hughes, Joe Hughes of Yakima, Washington, and we thought his principal might be George Segal Company of New York City, and we thought possibly Mr. Geschwill might be able to sell his hops to this buyer or somebody who wanted some seedless Oregon hops and did not seem too particular about the quality.

(Testimony of Robert Oppenheim.)

Q. With respect to downy mildew in Oregon in 1947, I believe Counsel asked you whether or not every Oregon yard was affected by downy mildew in 1947.

Does the fact that a particular yard may be affected by downy mildew at the time the hop is growing necessarily mean that such hops as are harvested, dried, cured and baled, from that particular yard will be affected by downy mildew?

A. No.

Q. Why not?

A. Because there may be some spots in the yard which the grower would not pick. If the great portion of the acreage is clean and he might have an odd spot, he might leave those, or there might be, say, a little that would not affect the quality, might be just a minute quantity, as I testified to.

Q. Would it be reasonable under some circumstances for a grower to refrain from harvesting downy-mildew-affected hops?

A. I am sure many growers cut down vines that are affected and don't pick them or don't let them go into the picking machine. That is just surmise on my part. I can't testify that I know that. [424]

Q. Reference was made to John I. Haas, Inc., and S. S. Steiner, Inc. You were asked whether or not you were affiliated with either one of those two concerns. Are those two concerns your principal competitors? A. They are.

Q. Was there any surplus of prime quality Oregon late cluster hops in 1947?

(Testimony of Robert Oppenheim.)

A. No, there was a scarcity of them.

Q. Would you say that scarcity continued all through the year 1947?

A. Well, if it started at the beginning it had to continue, because they were not there.

Q. Mr. Oppenheim, in your judgment is there any possible reasonable difference of opinion among qualified hop inspectors as to whether or not the samples of the Geschwill cluster 1947 crop of hops, which are in evidence here, are of prime quality?

A. I don't see how there could be. It is evident to the eye that they contain a large quantity of mildewed hops, diseased hops.

Mr. Kerr: That is all.

Recross-Examination

By Mr. Dougherty:

Q. Just one or two matters, Mr. Oppenheim. Do samples deteriorate after a year and a half?

A. They deteriorate in flavor, because the volatile oils become oxidized—I think the brewmasters call it cheesy. They definitely do that, but there is no change in the structure of the hop. A damaged hop is still a damaged hop. That does not change; cannot change.

Q. After they have been broken and handled, especially after a year and a half?

A. I think the samples speak for themselves. They are not in bad condition. They have been broken in places, but there are places where any

(Testimony of Robert Oppenheim.)

hop man can break them again and see exactly the structures of the hops.

Q. How about the oils, resins and lupulin?

A. That is all flavor. That would be definitely affected; no question about that.

Q. I wonder, Mr. Oppenheim, if you would examine Exhibit 34-D. Would you tell us what bale that is from?

A. Bale 70 of the Geschwill late clusters, Lot 79. Do you want me to examine it, sir?

Q. If you will, please. Does that show any effect of mildew?

A. Yes, but I don't think it shows as much mildew as Sample 130.

Q. Is that one of the samples that were acceptable?

A. That was one of the three beauties, yes, prize packages.

Mr. Dougherty: Thank you, Mr. Oppenheim.

Redirect Examination

By Mr. Kerr:

Q. What do you mean by "one of the three beauties"?

A. I was a little facetious. I apologize to the Court for doing that, but there was one of the three samples which I described as being better looking than the other samples.

Mr. Kerr: That is all.

(Witness excused.) [427]

BERT W. WHITLOCK

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Bert W. Whitlock.

Q. Where do you live? A. In Portland.

Q. What is your occupation?

A. I am in charge of the hop inspection work on the Pacific Coast for the United States Department of Agriculture.

Q. What type of hop inspection work do you refer to?

A. The determination of the leaf, stem and seed content of the hop.

Q. How is that determination of leaf, stem and seed content of hops made?

A. It is made by drawing samples from approximately 10 per cent of the lot of hops. These samples are taken into the laboratory and portions of the samples are put together in a common mass and mixed thoroughly, so that each cone is loosened or freed, one from the other, and the sample is put through a divider, which reduces the size of the sample but retains the high density of the sample; and from these dividers we get a small portion of the larger sample. [428]

That small portion is analyzed for leaf and stem

(Testimony of Bert W. Whitlock.)

and for seed and a certificate showing the percentages of each is issued.

Q. Those percentages are on the basis of weight, are they?

A. On the basis of weight and in terms of the whole per cent in fractions.

Q. You refer to a sample being taken of about 10 per cent of the lot. How large a sample is that?

A. A sample drawn from each bale will weigh anywhere from 100 to 120 grams.

Q. Then you said part of that sample is then used. How large a portion?

A. Well, it will run anywhere from a third to a half of the sample, depending on the size of the lot. The larger the lot——

Q. 40 to 60 grams, then?

A. 40 to 60 grams.

Q. What is the portion you then get?

A. I would say 30 to 45 grams, rather.

Q. 30 to 45 grams? A. Yes.

Q. You break that down into a smaller portion?

A. Yes; put it in large bags and loosen the samples and break up the larger stems, and then pour it through a divider, which cuts it exactly in half, and the half is cut again, and perhaps again until you get the sized sample you desire to use for the [429] analysis.

Q. Of the original sample drawn from the bale, what proportion thereof is finally used in making the analysis?

(Testimony of Bert W. Whitlock.)

A. That again depends on the size of the lot of hops. Our determinations are usually made on samples that will range anywhere from 20 to 40 or 50 grams, 60 grams.

Q. From 20 to 60 grams?

A. Yes. It depends on the size of the lot.

Q. This work is done under your supervision?

A. Yes.

Q. You consider a sample of from 20 to 60 grams, taken in the manner you have described, a reasonably representative sample for the purpose of determining the percentage of leaf—the percentage by weight of the leaf, stem and seed content of a lot of hops? A. Yes, sir.

Q. Does that analysis which you have just referred to form the basis of the official hop inspection certificate issued by your department?

A. Yes.

Q. You were brought in here by subpoena, were you not? A. Yes.

Mr. Kerr: That is all. [430]

Cross-Examination

By Mr. Dougherty:

Q. This procedure you have testified to, as I understand, these steps are taken to make your sample truly representative of the entire lot?

A. Yes.

Mr. Dougherty: Thank you.

(Witness excused.) [431]

HAROLD W. RAY

having been previously duly sworn, was recalled as a witness on behalf of Defendant and was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Mr. Ray, since the last session of court yesterday have you examined Exhibit 34, lettered A to J, which are the tenth-bale sample of hops?

A. I did not identify the samples as to exhibit numbers, but I did examine, I believe, twelve samples supposed to be tenth-bale inspection samples of the Geschwill lot of 130 bales, 1947 seedless hops.

Q. Did you note the bale numbers?

A. Yes, I have notations.

Q. Will you report to the Court as to the examination that you have made since the last session of court.

A. Do you want me to treat them as a whole or individual samples?

Q. Individually, if you like.

A. Individual samples?

Q. Yes.

A. I made the inspection last night upon the basis of mildew content only. This morning I have again examined the samples, and I assume from the appearance—however, they are more than a year old—that the quality was not damaged by mildew. It appeared to have been a good-colored hop,

(Testimony of Harold W. Ray.)

reasonably well picked. [432] They are not cleanly picked, but the certificate, I believe, shows 8 per cent. They were reasonably well picked, but they show considerable stem content. Judged on the basis of mildew, Sample No. 10 showed mildew discoloration.

Q. Excuse me. Refer to the bale number.

A. Bale No. 10.

Q. Very well.

A. Bale No. 10 showed mildew discoloration and numerous brown nubbins.

Sample No. 20, mildew discoloration, with a quantity of brown nubbins. That is, there were more in that than there were in No. 10.

Sample No. 30, mildew discoloration. That has what I call a medium quantity. With respect to this particular lot of hops, they would be medium with respect to the quantity of mildew in the samples as a whole.

Sample No. 40, mildew discoloration with a heavy infestation of brown nubbins.

Sample No. 50, mildew discoloration; again, a medium quantity of the brown nubbins.

Sample No. 60, mildew infestation with what I would call medium plus quantity of brown nubbins.

Sample No. 70 showed a very small number of mildewed nubbins, and it is my opinion that Sample No. 70 came very close to representing a prime quality hop, as near as I can judge in a [433] sample that small, but with respect to mildew alone I would say that it was very close to a prime hop, and I per-

(Testimony of Harold W. Ray.)

sonally would have accepted it as a prime hop provided I could determine to my own satisfaction that the balance of the hops in the bale run like that sample.

Sample No. 80, mildew infestation from medium to heavy. It was more than medium.

Sample No. 100 had a slight infestation of mildew and a like number of mildewed nubbins.

Sample No. 110, mildew infestation with medium to heavy infestation of nubbins.

Sample No. 120, mildew infestation with light to medium quantity of nubbins.

Sample No. 130, mildew infestation, and I call it light plus.

With the exception of Sample No. 70, I would consider as a whole none of the samples would qualify as prime quality.

Q. You have referred to the sample numbers in each case. A. I mean bale numbers.

Q. Your use of the word "nubbins" and the words "infestation" or "mildew infestation" refer to a comparison with the group as a whole?

A. Yes, from one sample to another. You have got to have some basis. [434]

Q. With respect to all samples except the sample of Bale 70, state whether or not in your opinion there is any reasonable basis for a difference of opinion among qualified hop experts as to whether or not each of the other samples is prime quality?

A. In my opinion there would be very little dif-

(Testimony of Harold W. Ray.)

ference of opinion, very slight. It is possible that there could be a slight difference of opinion, but my experience has been that all of the recognized inspectors of hops would grade the hops very nearly the same.

Q. Do you think that there would be any reasonable chance that any of these other samples would be graded as prime, on the basis of mildew infestation?

A. In my opinion, Sample—Bale No. 20 was the only one that could possibly be, and I think, on a little stretch, with a little stretching, it might be graded a prime hop.

Q. You say 20? A. No, not 20. I said 70.

Q. You mean 70 and not 20?

A. 70. I think I may have said 20—70.

Q. What does the term "false-pack" mean in the trade?

A. It means that the quality of the hops in a bale is not uniformly distributed. There will be spots in it that may appear to be very good, but if you would take a sample from the other side of the bale, or another portion of the bale, you might find, say, an entirely different-appearing hop. [435]

Q. What relation does that false-packed hop, that false-packing, have upon the quality of the hops in that bale?

A. If, in inspecting a bale of hops, we have any reason to be suspicious or to suspect that there may be false-packing, we usually try the bale; we inspect

(Testimony of Harold W. Ray.)

it and stick both sides; that is, one on each side, and the other edge on the reverse side of the bale, to see if the hops are alike. False-packing is caused by an improper mixing of the hops before they go into the baler or as they go into the baler.

Q. Are hops in bales which have been false packed considered in the trade to be in proper order and condition?

A. It is the practice, if we find it, to grade the bale as about the poorest quality that we find in the bale. Does that answer your question?

Q. Well, when you conclude a bale of hops is false-packed, has some prime quality hops in it and others that are definitely not prime, another portion of the bale, would you say that bale of hops was in good order and condition?

A. Not entirely in good order and condition. It usually does not happen. There may be a few bales in a crop that may be false-packed. I don't think it is usually done intentionally by the grower. It is simply possibly some carelessness in mixing them as they go to the baler. It is not a good condition, of course, because it is not a uniform bale.

Mr. Kerr: That is all. [436]

Cross-Examination

By Mr. Dougherty:

Q. You are President of A. J. Ray & Sons, is that correct? A. I am.

Q. Is that corporation in Oregon the agent of John I. Haas, Inc.?

(Testimony of Harold W. Ray.)

A. Correct. Well, now, I can't say positively that we would be the agent. We are representatives of John I. Haas, Inc.

Q. Is John I. Haas, Inc., one of the defendants in one of these cases?

A. Yes. He is in there, not in this case. He is defendant in the case brought by Mr. Wellman as plaintiff.

Q. Represented by same counsel as the defendant in this case? A. Yes, he is.

Q. Do I understand from your testimony yesterday that the only kind of hop contract that you have dealt in in recent years have been so-called prime quality contracts? A. Right.

Q. Did I understand you to say that in recent years all of the futures contracts in this area have been so-called prime quality contracts?

A. I never heard of any other kind, Mr. Dougherty.

Q. Did you ever inspect Mr. Geschwill's hop-yard in 1947? A. No, I didn't.

Q. Did you see any of his samples at the time of the harvest [437] or thereabouts?

A. No. I saw them here for the first time.

Q. Did I understand you to say in recent years 80 percent or more of the hops in this area have been under so-called prime quality contracts?

A. That was my statement. I think it is reasonably correct. It was an estimate, course, but I think it is reasonably correct.

(Testimony of Harold W. Ray.)

Q. About how many bales of hops did you reject under such prime quality contracts in 1944?

A. I would have to refer to notes to be able to tell you that. Is that permissible?

Q. Notes that you have with you?

A. Yes.

Q. Please do.

A. I beg your pardon. I haven't got them with me. I have got them in my briefcase, but I didn't imagine that I would require them at this hearing.

Q. Can you say whether or not, in 1944, you took in hops showing any damage, say, from mold?

A. I assume that we probably did take in some with very slight mold in 1944. As I recollect it, there was a very small amount of mold in the State of Oregon. Some hops had mold, but no doubt we took some in on adjustment, at some discount below the contract price. I am not certain of that. [438]

Q. As a matter of fact, in 1944 you took any kind of hop that was tendered, is that generally true?

A. Well, in 1944 hops were rather scarce. No, I wouldn't say—I don't believe, Mr. Dougherty, that we did that, that we did do that. When you say we took them you mean we took them at full contract price, is that what you mean?

Q. Took them under prime quality contracts?

A. You want me to say something that is not just exactly the fact.

(Testimony of Harold W. Ray.)

Q. I want you to state the fact, whatever it may be.

A. We might have taken them in on a contract that was written as prime quality, and the hops might not have been prime quality. The buyer might have been willing to waive a quality specification. That is possible. I don't say that we did, but it is very possible, because that frequently is done.

Q. In other words, would it be your opinion, Mr. Ray, when hops are scarce the quality is not important? A. I didn't quite get the question.

Q. Would it be your opinion that when hops are scarce this quality, so-called standard, is not so important?

A. Well, when hops are scarce, quality standards, if they want to get hops for the customers, they must be disregarded to some extent.

It is a matter of the attitude of the consumer. If a consumer is requiring the product and he is willing to waive [439] quality specifications, why, then, hops are accepted when they are below the specified prime quality.

Q. By the consumer whom do you mean?

A. I mean the brewery.

Q. Do you sell direct to breweries?

A. I don't; no.

Q. Can you say of your own personal knowledge what the attitude of the breweries is?

A. I can, because I formerly did sell to breweries to some extent.

(Testimony of Harold W. Ray.)

Q. In recent years?

A. Not in recent years, no.

Q. When you inspect hops, what are your tests? I understand they are feel and texture and, primarily, the flavor test? A. Correct.

Q. So far as you can now tell from these samples that are over a year and a half old, do I understand that the flavor at the time was probably all right?

A. I think probably so, Mr. Dougherty. I can't be positive, but, judging from the appearance, by the color of the hop in looking at them at the light this morning, I judge that the hop had a good flavor.

Q. Ordinarily, in inspecting hops, do you make a microscopic examination for mildew content? Is that customary in the trade? A. It is not.

Q. You testified yesterday concerning certain sales in New York or, rather, certain purchases?

A. Yes, I did.

Q. Can you say whether any of these purchases were of hops which were under contract to another dealer?

A. I think not. No, they were not. In fact, I know they were not.

Q. Were any of these hops which had been rejected by another dealer? A. They were not.

Q. Were any of these hops that were covered by a chattel mortgage to another dealer?

A. Not to my knowledge. I think not.

(Testimony of Harold W. Ray.)

Q. I ask you to examine Exhibit 34-B.

A. Yes.

Q. First, I will ask you if this was one of the samples which you testified you previously examined?

A. I judge it is; out of the 130-bale lot; year, 1947, of Lot 79. I assume that is the same sample.

Q. Would you now re-examine it and tell us about the mildew effect shown in that sample?

A. Yes, there is a considerable amount of mildew discoloration and nubbins apparent in this sample. In examining all these samples, I made fresh breaks. In other words, I split them in places they had not been split before, and, while this sample is [441] one of the three, it shows below average of the others. It does show a considerable quantity of these nubbins in some of the edges—we call them breaks. Other than that, that sample appears to have been of a good quality and it is one of the three better ones.

Q. When you examined all of these samples, you noticed a material difference between the general run and Sample 70, 100, and 130, is that correct?

A. Yes, those three samples showed a less quantity of mildewed nubbins than the others did. As I made additional breaks in them, I found more nubbins visible than had been apparent in the breaks that had previously been made, but still they showed less than the average of the entire lot.

(Testimony of Harold W. Ray.)

Q. In 1947 did you take in, under prime quality contracts, any hops showing any mildew?

A. I think I did, yes.

Q. Did you take in any hops, under prime quality contracts, which showed some material mildew damage?

A. Not under contracts. We took them in under a compromise. We had rejected the hops on the contract and repurchased them at a compromise price, at a lower price. There were a few lots that showed a material quantity of mildew, and those were cases in which the brewery had been willing to accept on the samples submitted on these particular hops.

Q. You took them in, but you insisted on a reduction in price, [442] is that correct?

A. I insisted, upon orders of my superior.

Q. Which is——

A. ——John I. Haas & Company, Inc., Washington, D. C.

Q. Mr. Ray, I would like to ask you: In practice, is it not a fact that a prime quality hop is a good, merchantable hop?

A. Mr. Dougherty, I think that a prime quality hop must be a good, merchantable hop, but it is also my opinion that there could be a good, merchantable hop that would not be prime quality.

Q. There might be good, merchantable hops which, in your opinion, would not be prime quality?

A. That is my opinion; yes, sir. I think, when

(Testimony of Harold W. Ray.)

you speak of a good, merchantable hop—good, merchantable quality and condition—I think it refers more to the condition of the bale of hops than it does to the actual quality of the hops. That is my conception, my statement.

Q. As a matter of practice, now, aside from opinion, is it not a fact that good, merchantable hops are taken in under so-called prime quality contracts?

A. They must be, yes, if it is a prime quality hop. Well, now, wait a minute. I didn't quite get your question. I didn't understand it sufficiently. No, not necessarily.

Mr. Dougherty: Thank you.

(Witness excused.) [443]

H. F. FRANKLIN

having previously been duly sworn, was recalled as a witness on behalf of Defendant, was examined and testified further as follows:

Direct Examination

By Mr. Kerr:

Q. During the recess, after a session of this court yesterday, did you examine the samples of Mr. Geschwill's late cluster hops which are identified as Exhibits 34, A to J?

A. I didn't notice the exhibit. I examined twelve samples of Lot No. 79, over there on that table.

Q. Were those tenth-bale samples?

(Testimony of H. F. Franklin.)

A. Yes. Bale No. 10, No. 20, No. 30, and so on.

Q. Bale No. 10, No. 20, and so on?

A. Yes.

Mr. Kerr: Will Counsel agree that those are the samples marked 34, A to J?

Mr. Kester: If you say so.

Mr. Kerr: Yes.

Mr. Kester: It is so stipulated, assuming you are stating correctly. We did not check the numbers ourselves, but we will take your statement for it.

Mr. Kerr: Very well.

Q. Will you state the results of your examination of those samples?

A. Do you want each individual sample or the lot as a whole? [444]

Q. Let us have it by individual samples and then the lot as a whole.

A. Bale No. 10, some nubbins, mildew discoloration.

Bale No. 20, excess nubbins and mildew discoloration.

Bale No. 30, very few nubbins and some discoloration.

Bale No. 40 was the same, some nubbins and some discoloration.

Bale No. 50, the same.

Bale No. 60, the same.

Bale No. 70, that has very few nubbins and very little mildew discoloration.

Bale No. 80, some nubbins and some discoloration.

(Testimony of H. F. Franklin.)

I found no sample representing Bale 90, and Bale 100 has very few nubbins and very little discoloration.

Bale 110, some nubbins and very little discoloration.

Bale 120, some nubbins and some discoloration.

Bale 130, very little nubbins and very little discoloration.

I have a notation here: In splitting the sample in two places it showed practically no mildew damage; in splitting the sample in another section, it showed considerable nubbins and mildew discoloration.

Q. Which of the twelve samples you examined made the best appearance?

A. I think No. 70. Yes, No. 70. [445]

Q. With respect to the lot, as a whole, judging it as a whole, what is your opinion of the samples?

A. Well, there is nubbins all through the lot. Sample No. 20 seemed to have more than any of the others, but there is mildewed nubbins and discoloration all through the lot.

Q. What is your report on Bale 20?

A. I have it down here as excess nubbins and mildew discoloration.

Q. By "excess" you mean what?

A. More than there were in the other samples.

Q. State whether or not in your judgment any of those samples rated prime quality with respect to damage by mildew?

(Testimony of H. F. Franklin.)

A. When you say a hop should be free from disease, why, you couldn't say these hops were prime quality, because they do have mildew in them, mildew damage. Mildew certainly is a disease.

Q. Each of the samples showed some evidence of mildew damage, is that right? A. Yes, they did.

Q. Did you make new breaks of the samples?

A. No, I didn't. Mr. Ray was ahead of me and he broke them up pretty well. I didn't break any.

Q. Are you, by any chance, a defendant in any legal action now pending. A. No. [446]

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Are you presently in the hop business?

A. No, I am not.

Q. Do I understand that you were in the hop business up until 1945?

A. That is right. 1945 was my last year.

Q. But not presently? A. No.

Q. Do you have any personal knowledge of the 1947 hop crop up around Mt. Angel and Woodburn?

A. No, I don't. I worked as an inspector only in Grants Pass in 1947. I didn't see a Willamette Valley hop in 1947.

Mr. Dougherty: Thank you.

(Testimony of H. F. Franklin.)

Redirect Examination

By Mr. Kerr:

Q. You are not now in the employ of Hugo V. Loewi, Inc.? A. Beg your pardon?

Q. Have you ever been employed by Hugo V. Loewi, Inc.? A. No, I have not.

Q. Have you ever been employed by Mr. C. W. Paulus? A. No.

Mr. Kerr: That is all.

(Witness excused.)

Mr. Kerr: Defendant rests.

(Defendant rests.)

Plaintiff's Rebuttal Testimony

FRED GESCHWILL

the Plaintiff herein, having been previously duly sworn, was recalled as a witness in his own behalf, in rebuttal, and was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Mr. Geschwill, there has been some talk about your hops being false-packed. I will ask you whether at the time the hops were weighed in at the warehouse in Mt. Angel, on or about October 10th, Mr. Fry made any statement to you whatsoever with respect to the hops being false-packed?

A. He never did. I never heard that name before

(Testimony of Fred Geschwill.)

until last week in Portland; never mentioned anything about any false-packing. They did ask each other what false-packing is.

Q. As far as farmers are concerned, is that a term that is customarily used in the business?

A. You mean "false-packing"?

Q. Yes.

A. I never heard that word. The only name "false-packing" I ever heard was when packing or stacking the bales if I would have the biggest bales —stack the little ones in below and the big ones on top, and the inspector would find them little bales in the bottom, he would say "false-pack," but I can't see how that could happen in hops where they are all picked by machine and handled in that way. [448]

Q. How about your conversation in Mr. Paulus' office or on about October 29th? Was anything said to you at that time—

A. This is the first time I heard "false-pack."

Q. —was anything said at that time about the hops being false-packed?

A. Yes, Mr. Fry mentioned that name ever since. We talked about it, "false-pack," but I still can't figure out what "false-pack" is.

Q. I am talking about the conversation in Salem at Mr. Paulus' office, when you and Mr. Paulus were there and Mr. Paulus and you went into the sample room and looked at samples. Was anything said at that time about the bales being false-packed?

(Testimony of Fred Geschwill.)

A. No, nothing was mentioned until last week when I heard Mr. Fry mention it, when he made his statement.

Q. What is the fact as to whether or not your hops were baled just as they came off the kiln floor?

A. That is about the only way you could do it. You can't go in there and take them out one by one. There is millions of hops in there.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. Were you present when your hops were sampled and inspected, your cluster hops?

A. Yes. [449]

Q. Mr. Fry was doing the inspecting?

A. Yes.

Q. Do you recall at that time he turned over certain bales that did not compare with other samples or other bales?

A. He never made them remarks because he says, "That is a uniform lot," and I just repeat again, "That is one of the nicest lots I received this year." That was the words he said.

Q. Did he at that time call to your attention that certain of the samples taken from the 130 bales——

A. Yes.

Q. —did not appear to be uniform?

A. He himself said they appeared to be uniform There is a little variation in them; each bale, if it

(Testimony of Fred Geschwill.)

sits along the wall or close to the door, where the door is open, it will discolor a little bit, just like a bale of hay out in the field.

Q. Would he then turn over the bale and take a trying out of the other side?

A. He took tryings out of every bale and he was satisfied with the whole lot.

Q. Did you see him take more than one trying out of any one bale? A. I might have, yes.

Q. Did you see it?

A. I wouldn't say that. I wasn't there all the time, but I would let him go ahead and take any out of any bale. [450]

Q. How long were you there when the bales were being sampled?

A. I was there mostly during weighing time, when he weighed them. I watched my weights.

Q. Were you there when Mr. Fry took tryings from each bale?

A. Yes, I saw the bales all lined up and tryings laying on top of the bale; each bale and a handful of hops.

Q. Were you there when he took the tenth-bale samples? A. Yes.

Q. Did you see the tenth-bale samples?

A. Yes.

Q. Did you have any conversation with Mr. Fry concerning the tenth-bale samples?

A. Yes, we talked about them and I asked him—

(Testimony of Fred Geschwill.)

I wanted to know, I said, "How does the hops look?" And he said, "Fine."

Q. Was there any conversation between you and Mr. Fry about a comparison of one bale, one tenth-bale sample, with others?

A. No, there wasn't.

Q. Was there any conversation between you and Mr. Fry with respect to a comparison of the tryings of some bales with others? A. No.

Q. Isn't it a fact that Mr. Fry stated to you—pointed out to you 20 to 30 bales that showed better tryings than others?

A. That didn't come up until a week afterwards.

Q. When did it come up?

A. Up there by Mr. Paulus' office, that is the first time I [451] heard they was ready to reject these hops; that is the first time I knew that.

Q. How long were you there after the tenth-bale samples had been drawn?

A. After they was weighed, I went home.

Q. Were you there all the time while the tryings and the tenth-bale samples were taken?

A. I was there up until—I was there all the time when they was being weighed. I helped pull them onto the scale.

Q. You stated you were not there all the time. During what part of the time weren't you there?

A. Well, whenever they didn't work at pulling these bales out and marking each bale and stamping

(Testimony of Fred Geschwill.)

each bale, numbering each bale, and those things. Then there was no work for me to do.

Q. During what period of time in hours or minutes would you estimate you were not there?

A. I couldn't recall that.

Q. Do you know whether or not any tryings were taken from the bales while you were not there?

A. Could be.

Q. You say you did not see any of the bales turned over and tryings taken on the side away from the sample?

A. I don't recall it. Of course, always when receiving hops, when a man is in doubt, he is going to stick them again, where he can get a proper sample, and pull the knife again—It don't [452] make any difference.

Q. You don't know whether or not that happened with respect to your hops?

A. It could have been.

Mr. Kerr: That is all.

(Witness excused.)

Mr. Kester: I would like to offer as Exhibit 51 this contract between Mr. Paulus and Hugo V. Loewi, Inc., if it has not already been marked. As I understand, everything that has been marked is in evidence. It has been rather confusing here. I would like to have that cleared up, to be sure that everything is in.

Mr. Kerr: Our record does not show as to No. 31. Our record does not show.

Mr. Kester: I am sure it has been marked.

Before closing the case, your Honor, I would like to say that there has been a good deal of testimony in this case which is of a rather general nature regarding the hop business. I do not want to go over that same ground again in the two cases that follow, if it is possible to avoid it.

I would like to suggest that we would be willing to stipulate that all the testimony in any one of these three cases may be considered in connection with all three cases in so far as it may be relevant or material to the issues in that case.

I do not mean by that to preclude any further evidence on any point that is important in any case, but it would at least save a lot of repetition of matter that is all more or less general in nature.

Mr. Kerr: May we consider that during the recess?

The Court: We do that all the time. I could have required consolidation of the cases and accomplished that purpose, but I did not do it. It is in your hands now. I could consolidate the two remaining cases, should I find it necessary to do that.

(Thereupon a recess was taken until 1:30 o'clock P. M.)

(Court reconvened at 1:30 o'clock P. M., January 27, 1949.)

G. R. HOERNER

was thereupon recalled as a witness on behalf of Defendant and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State in what particular you desire to correct your testimony, if you do wish so to do?

A. Yes. I was checking my notes this morning and found I had misquoted something, and I would like for the record to be correct.

Referring to Sample 401, total weight of 23.7 grams, 1.2 grams leaves and stems, 8.9 grams clean hops, 13.6 grams infected hops, or a total of 60.44 per cent infected cones. These are the correct statements.

Mr. Kerr: Thank you. Just a moment. Give me those again.

A. This is Sample 401. Total 23.7 leaves and stems, 23.7 grams—No, let me repeat that. Total weight 23.7 grams; 1.2 grams leaves and stems; clean, 8.9: infected, 13.6; percentage infected, 60.44.

(Witness excused.) [455]

Mr. Kerr: That will be all.

(Testimony closed.)

Mr. Kester: Was there some understanding with respect to the closing of this case, in respect to the use of the testimony in the next one? I think perhaps, if there is to be a stipulation, it should be entered in this case before we start the next one.

Mr. Kerr: The defendant is agreeable to any arrangement that the Court might approve relative to the application in each of the two succeeding cases of such pertinent portions of the records in the present case.

The Court: Here is the way we usually do it: It works out a little simpler than you think. Cases that have common grounds—I mean the same general situation—the provision simply is that—the new rule is that they should be tried together. The word "consolidated" is not used in the rule. I think it doesn't make any difference in this particular instance. The order usually is that the testimony in any case shall be deemed to have been taken and heard and shall be considered in any of the cases being tried together to the extent it is material, competent and relevant.

Mr. Kerr: That is satisfactory.

The Court: It is surprising how well it works out. I have never known of a question arising. It will save in these cases, [456] these three cases, going into general matters, the general history of the 1947 crop. It would leave, I take it, in these three cases just the particular core of the controversy about the particular crop.

Mr. Kerr: That is satisfactory to the defendant, if it is to the Court.

The Court: So ordered as to the three cases.

Mr. Kester: Before resting in the Geschwill case, we reserve the right previously suggested about any amendments that may become necessary. [457]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, Court Reporter of the above-entitled Court, do hereby certify that on the 25th, 26th and 27th days of January, 1949, I reported in shorthand the proceedings occurring on the trial of the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of pages numbered 1 to ...., inclusive, constitutes a full, true and accurate transcript of said proceedings to taken by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 25th day of October, A.D. 1949.

/s/ IRA G. HOLCOMB,
Official Reporter.

[Endorsed]: Filed December 28, 1949.

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Transcript on removal from Marion County, Oregon, Motion to dismiss, to strike, etc., Memorandum of Judge McColloch, Reply to counterclaim, Amended answer, Memorandum decision of Judge

McColloch, Findings of fact and conclusions of law, Judgment, Notice of appeal, Supersedeas bond, Order extending time to file appeal, Statement of points, Designation of contents of record, Order to send exhibits, Appellee's designation of record, Order extending time to file appeal, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4082, Fred Geschwill vs. Hugo *C.* Loewi, Inc., a corporation, in which Hugh V. Loewi, Inc., is the appellant, and Fred Geschwill is the appellee, that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and the appellee, and in accordance with the rules of this Court.

I further certify that there is enclosed herewith duplicate transcript of proceedings of January 25, 26 and 27, 1949, filed in this office in this cause, together with exhibits 1 to 5, 6a, 6b, 7 to 9, 10a, 10b, 10c, 11 to 18, 21, 23 to 30, 32, 33, 39 to 48 and 51.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 17th day of December, 1949.

LOWELL MUNDORFF,
Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12440. United States Court of Appeals for the Ninth Circuit. Hugo V. Loewi, Inc., a corporation, Appellant, vs. Fred Geschwill, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed December 28, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12440

HUGO V. LOEWI, INC.,
a Corporation,

Appellant,

vs.

FRED GESCHWILL,

Appellee.

HUGO V. LOEWI, INC., a Corporation,

CONCISE STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The appellant hereby adopts the statement of points upon which it intends to rely on appeal, which was filed with the Clerk of the United States

District Court for the District of Oregon. (Transcript, Document No. 12.)

Dated this 21st day of December, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Concise Statement of the Points on Which Appellant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,

Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 28, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE PORTIONS OF THE RECORD WHICH APPELLANT THINKS NECESSARY FOR CONSIDERATION OF POINTS TO BE RELIED UPON

The appellant, Hugo V. Loewi, Inc., hereby designates for inclusion in the printed record on appeal the following portions of the record, proceedings, and evidence:

1. Transcript on removal from the Circuit Court of the State of Oregon for the County of Marion. (Transcript, Document No. 1.) (The portion of this document other than the Complaint need not be printed unless it is required to be in the record by the practice of this court.)

2. Motion to dismiss, to strike, and for more definite statement. (Transcript, Document No. 2.)

3. Order reserving decision on motion. (Transcript, Document No. 3.)

4. Amended answer. (Transcript, Document No. 5.)

5. Reply to counterclaim. (Transcript, Document No. 4.)

6. Findings of fact and conclusions of law. (Transcript, Document No. 7.)

7. Memorandum of decision. (Transcript, Document No. 6.)

8. Judgment. (Transcript, Document No. 8.)

9. Notice of appeal. (Transcript, Document No. 9.)

10. Supersedeas bond. (Transcript, Document No. 10.)

11. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949. (Transcript, Document No. 11.)

12. Statement of points on which defendant intends to rely on appeal. (Transcript, Document No. 12.)

13. Designation of contents of record on appeal, filed with the Clerk of the United States District Court for the District of Oregon. (Transcript, Document No. 13.)

14. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case. (Transcript, Document No. ...)

15. Order for transmittal of exhibits. (Transcript, Document No. 14.)

16. Order extending time for filing record on appeal and docketing appeal. (Transcript, Document No. 16.)

17. Transcript of docket entries. (Transcript, Document No. 17.)

18. Clerk's certificate of transcript. (Transcript, Document No. 18.)

19. The following exhibits:

(The following designation of exhibits is to be disregarded if an order is entered by the court pursuant to the stipulation filed contemporaneously herewith.)

(a) Plaintiff's exhibits having the following numbers: 5, 6-A, 6-B, 7, 8, 9, 10-A, 10-B, 10-C, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 51.

(b) Defendant's exhibits having the following numbers: 1, 2, 3, 4, 32, 33, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48.

20. This designation of the portions of the record which appellant thinks necessary for consideration of points to be relied upon.

21. Stipulation with respect to printing of exhibits.

22. Order which may be entered pursuant to such stipulation.

Dated this 21st day of December, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of the Portions of the

Record which Appellant Thinks Necessary for Consideration of Points to Be Relied Upon, and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,
Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 28, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION WITH RESPECT TO PRINTING OF EXHIBITS

Whereas, there are in this cause a substantial number of documentary exhibits (including letters, telegrams, and other record) which would be very expensive to print or otherwise reproduce; and,

Whereas, the appeal involves factual issues, and each party on brief and in argument will wish to refer to certain of said documentary exhibits;

It Is Hereby Stipulated, subject to the approval of the court, that an order may be entered on this appeal permitting all of said documentary exhibits to be considered by the court in their original form without the necessity of printing or otherwise reproducing the same.

The exhibits to which this stipulation refers have the following numbers:

(a) Plaintiff's exhibits: 5, 6-A, 6-B, 7, 8, 9, 10-A, 10-B, 10-C, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 51.

(b) Defendant's exhibits: 1, 2, 3, 4, 32, 33, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48.

Dated this 21st day of December, 1949.

/s/ STUART W. HILL,
Of Attorneys for Appellant.

/s/ WILLIAM E. DOUGHERTY,
Of Attorneys for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,
United States Circuit Judges.

[Endorsed]: Filed December 30, 1949.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD CONSIDERED MATERIAL ON THE APPEAL

The appellee, Fred Geschwill, having been served with appellant's designation of certain portions of

the record, hereby designates the following additional parts of the record which appellee thinks material to the consideration of the appeal:

1. Appellee's designation of additional contents of record on appeal. (Transcript, Document No. 15.)

2. Plaintiff's Exhibit 28. (The printing of exhibits is subject, however, to such order as the Court may enter in connection with the stipulation, heretofore filed, relating to the consideration of the exhibits in their original form.)

3. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records now before this Court on appeal from the judgments of the United States District Court for the District of Oregon in the cases of Hugo V. Loewi, Inc., Appellant, vs. Kilian W. Smith, Appellee, No. 12441, and John I. Haas, Inc., Appellant, vs. O. L. Wellman, Appellee, No. 12442, which two civil actions were tried in the District Court jointly with this action. (The printing in this case of the records in those cases is subject, however, to such order as the Court may enter with respect to appellee's motion referred to in the next paragraph below.)

4. Appellee's motion for consolidation of the record in this case with the records on appeal in the two cases named in the preceding paragraph, which motion is filed contemporaneously herewith.

5. Such order as the Court may enter with re-

spect to appellee's motion referred to in paragraph 4 above.

6. This designation of additional parts of the record considered material on appeal.

Dated this 30th day of December, 1949.

/s/ ROY F. SHIELDS,

/s/ RANDALL B. KESTER,

/s/ WILLIAM E. DOUGHERTY,
MAGUIRE, SHIELDS, MORRISON & BAILEY,
Attorneys for Appellee.

Service of copy acknowledged.

[Endorsed]: Filed January 3, 1950.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSOLIDATION OF RECORDS

Now comes the appellee, Fred Geschwill, and moves the Court to consolidate, for the purposes of this appeal, the record in this case with the records now before the Court in the contemporaneously appealed cases of Hugo V. Loewi, Inc., Appellant, vs. Kilian W. Smith, Appellee, No. 12441, and John I. Haas, Inc., Appellant, vs. O. L. Wellman, Appellee, No. 12442, to the extent that (a) the evidence, exhibits and proceedings contained in the records

on appeal in said other two cases may be considered as a part of the record in this case, and (b) any part of the evidence, exhibits or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case.

In support of the foregoing motion the appellee respectfully shows the Court:

1. All three cases are civil actions which involve common questions of law and fact.

2. The three cases were tried jointly in the District Court. There is one combined record for all three cases to this extent: The parties consented and the District Court ordered that the evidence in any of the three actions should be deemed to have been taken and heard and should be considered in each of the actions so tried together in so far as such evidence was pertinent, material and relevant.

3. Appellant's designations of record in the three cases undertook to divide such combined record into three distinct and separate parts. By appellee's cross-designations the part of the combined record below contained in each of the records on appeal has been included in the record on appeal in the other cases. It would, however, be very expensive, and we think unnecessary, to print again in this case the portions of the combined record which will be printed and will be before the Court in said other two cases.

4. Appellant's statement filed herein indicates

that twenty-three of the forty-two points upon which appellant intends to rely (being Points 1 through 23) relate to the District Court's findings of fact. In order to meet appellant's contentions on such factual issues in this case it will be necessary for appellee to refer in part to evidence which is material and relevant to this case, and which appears in the combined record, but which under appellant's designation would be printed or otherwise available for consideration only by reference to the record in another of said cases.

5. The Federal Rules of Civil Procedure, whenever applicable, have been adopted as part of the Rules of this Court with respect to appeals in actions, such as these, of a civil nature. Rule 42 (a) of the Federal Rules of Civil Procedure provides:

"(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." It is submitted that the foregoing rule is applicable here, and that the granting of appellee's motion together with the like motions filed in said other two cases would, within the intent and purpose of that rule, facilitate the Court's consideration of each of the three cases, and also avoid unnecessary costs.

The foregoing statements of fact are based upon

the records before the Court, and are also verified by the affidavit appended hereto.

Subject to the approval of the Court, the appellee submits the foregoing motion without oral argument, unless a hearing be requested by the appellant.

Respectfully submitted,

/s/ ROY F. SHIELDS,

/s/ RANDALL B. KESTER,

/s/ WILLIAM E. DOUGHERTY,

MAGUIRE, SHIELDS, MORRISON & BAILEY,

Attorneys for Appellee.

So Ordered:

WILLIAM DENMAN,
Chief Judge.

WILLIAM HEALY,
HOMER BONE,
United States Circuit Judge.

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, William E. Dougherty, being first duly sworn, do depose and say that I am one of the attorneys of record for appellee in the within-entitled case, that I have knowledge of the facts, and that the state-

ments made in support of the foregoing motion are true as I verily believe.

/s/ WILLIAM E. DOUGHERTY,

Subscribed and sworn to before me this 30th day of December, 1949.

[Seal] /s/ MARIAN HUGGINS,
Notary Public for Oregon.

My Commission expires: 3/13/51.

Receipt of copy acknowledged.

[Endorsed]: Filed January 4, 1950.

[Title of Court of Appeals and Cause.]

ANSWER TO MOTION FOR CONSOLIDATION OF RECORDS

Now comes the appellant, Hugo V. Loewi, Inc., a corporation, and files this Answer to the Motion for Consolidation of Records heretofore filed on behalf of the appellee. We consent on behalf of the appellant that the evidence, exhibits, and proceedings contained in the records on appeal in said other two cases may be considered as a part of the record in this case, so far as pertinent, and that any part of the evidence, exhibits, or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case, so far as pertinent.

In support of this Answer, we rely upon the following portion of the Transcript of Proceedings in this case (Tr. 456):

"Mr. Kester (appearing for the plaintiff): Was there some understanding with respect to the closing of this case, in respect to the use of the testimony in the next one? I think perhaps, if there is to be a stipulation, it should be entered in this case before we start the next one.

"Mr. Kerr (appearing for the defendant): The defendant is agreeable to any arrangement that the Court might approve relative to the application in each of the two succeeding cases of such pertinent portions of the record in the present case.

"The Court: Here is the way we usually do it: It works out a little simpler than you think. Cases that have common grounds—I mean the same general situation—the provision simply is that—the new rule is that they should be tried together. The word "consolidated" is not used in the rule. I think it doesn't make any difference in this particular instance. The order usually is that the testimony in any case shall be deemed to have been taken and heard and shall be considered in any of the cases being tried together to the extent it is material, competent and relevant.

"Mr. Kerr: That is satisfactory.

"The Court: It is surprising how well it works out. I have never known of a question arising. It will save in these cases, these three cases, going into general matters, the general history of the 1947

crop. It would leave, I take it, in these three cases just the particular core of the controversy about the particular crop.

"Mr. Kerr: That is satisfactory to the defendant, if it is to the Court.

"The Court: So ordered as to the three cases."

Respectfully submitted,

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I, Stuart W. Hill, being first duly sworn, depose and say that I am one of the attorneys of record for appellant in the within entitled case, that I have knowledge of the facts, and that the statements made in support of the foregoing Answer are true as I verily believe.

/s/ STUART W. HILL,

Of Attorneys for Appellant.

Subscribed and sworn to before me this 7th day of January, 1950.

[Seal] /s/ GERALDINE RIST,

Notary Public for Oregon.

My Commission Expires May 22, 1953.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Answer to Motion for Consolidation of Records and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated January 7, 1950.

STUART W. HILL,
Of Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I, Geraldine Rist, being first duly sworn, depose and say: On January 7, 1950, I mailed a copy of this Answer to Motion for Consolidation of Records to Maguire, Shields, Morrison & Bailey, Attorneys for the Appellee, by depositing the same in the United States mail, correctly addressed to their office in the Pittock Block, Portland, Oregon, first class postage fully prepaid.

[Seal] /s/ GERALDINE RIST.

Subscribed and sworn to before me this 7th day of January, 1950.

/s/ STUART W. HILL,
Notary Public for Oregon.

My Commission Expires Feb. 27, 1953.

[Endorsed]: Filed January 9, 1950.

No. 12440

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,
Appellant,

v.

FRED GESCHWILL,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Equitable Building,
Portland, Oregon,
Attorneys for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND 5-50

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No. 12440

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,
Appellant,

v.

FRED GESCHWILL,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

JURISDICTION

This cause was commenced on March 16, 1948, in the Circuit Court of the State of Oregon for the County of Marion, to recover the purchase price of a quantity of hops, the amount for which judgment was demanded being $21,199.70, exclusive of interest and costs (Tr. 2, 7, 16).

Within ten days thereafter, on March 26, 1948, a petition for removal of this cause was filed in said Cir-

cuit Court and an order of removal was entered by the judge of the Circuit Court (Tr. 20, 21), that being within the time allowed by Title 28, U.S.C.A., Section 72, inasmuch as that was at the time or before the defendant was required by Sections 1-602 and 1-801, Oregon Compiled Laws Annotated, to answer or plead to the complaint of the plaintiff. Thereafter, on April 23, 1948, the defendant entered in the District Court of the United States for the District of Oregon, a certified copy of the record in such suit commenced in such Circuit Court (Tr. 23).

This cause was removed to the District Court for the District of Oregon, by the defendant, a nonresident of Oregon, pursuant to Title 28, U.S.C.A., Section 71, this being a suit of a civil nature at law of which the District Courts of the United States were given jurisdiction (Tr. 2, 17, 20). The District Court for the District of Oregon had jurisdiction of this cause by reason of Title 28, U.S.C.A., Section 41(1), this being a suit of a civil nature at law where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and is between citizens of different states, the defendant being a citizen of New York and the plaintiff of Oregon (Tr. 2, 17, 20). Upon the repeal of that section, the District Court had jurisdiction by reason of Title 28, U.S.C.A., Section 1332.

A final judgment was entered in this cause by the District Court, in favor of the plaintiff, on Sept. 30, 1949, for $15,668.18, together with interest and costs (Tr. 43).

This appeal was taken pursuant to Title 28, U.S. C.A., Section 1291. The notice of appeal from such judgment was filed on October 10, 1949 (Tr. 44).

STATEMENT OF CASE

This is an appeal by the defendant from a judgment for the plaintiff in an action for the contract price of the 1947 crop of cluster hops produced by the plaintiff and contracted to be sold to the defendant. The hops in question were rejected by the defendant as not of the grade, quality and condition required by the contract.

The defendant moved for dismissal of the action on the ground the complaint fails to state a claim against the defendant upon which relief can be granted (Tr. 23-25). This motion was provisionally denied and the legal questions involved were reserved to the trial (Tr. 26). The defendant's answer likewise raises this issue (Tr. 26).

The defendant counterclaimed for $4,000.00 which it advanced to the plaintiff pursuant to the contract as a loan to cover certain production, harvesting and processing costs (Tr. 30, 31).

The case was tried without a jury. The court issued a Memorandum of Decision (Tr. 33), signed (with one change) Findings of Fact and Conclusions of Law prepared by the plaintiff's counsel (Tr. 34-42), and entered judgment (Tr. 43, 44) for the plaintiff for the full contract price less the advances and less proceeds of the plaintiff's resale of the hops after this action was com-

menced, or a net judgment for $15,666.18 plus interest and costs.

This is one of three cases involving similar hop sale contracts which were tried in series by the same court under stipulation and order (Tr. 456) that the testimony in each case shall apply to each other case insofar as material. The other cases are Hugo V. Loewi, Inc., Appellant, v. Kilian W. Smith, Appellee, No. 12441, and John I. Haas, Inc., Appellant, v. O. L. Wellman, Appellee, No. 12442. Each of these cases is now before this court on appeal and the records of all three are consolidated for the purpose of each appeal (Tr. 515-518).

The ultimate issues in this case are (1) whether or not the hops tendered by the plaintiff and rejected by the defendant were of the grade, quality and condition required by the contract, and (2) whether, in the event the hops did conform to the contract requirements, so that the defendant's rejection was a breach of contract, the plaintiff's measure of recovery is the contract price, or is limited by contract and statute to the difference between the contract price and the market value of the hops.

The contract (Tr. 8) provides that the hops shall be

> "not affected by spraying or mold, but shall be of prime quality, in sound condition, of good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition."

The contract provision relative to the measure of damages for any breach of the contract is as follows (Tr. 13):

> "* * * upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages."

The defendant's rejection of the hops was by reason of damage resulting from downy mildew which attacked the hops prior to harvest (Tr. 465). The plaintiff's complaint was drawn on the theory that the rejection was due to a decline of market price rather than the quality or condition of the hops (Tr. 5). Absolutely no support for this contention, however, was introduced at the trial. The evidence is uncontradicted and conclusive that the market price for such hops remained at or above the contract price until long after the defendant's rejection of the hops (Exhibit 33, Tr. 285; Tr. 361-363, 416, 419).

The contract is for "future goods" in that it provides for delivery in processed and baled form of hops which were being grown when the contract was executed (Tr. 7, 8, 284). The contract is dated August 18, 1947 (Exhibit 1, Tr. 85). The advance and loan of $4,000 provided for in the contract (Tr. 11) was made by check mailed by the defendant to the plaintiff on August 27 (Tr. 98; Exhibit 8, Tr. 85). Harvest of the hops began September 2 (Tr. 76).

Downy mildew is a type of mold which attacks both the hop vines and the hop cones (Tr. 366, 370). Its

effect upon the hop cones may be to kill the hop, resulting in stunted, dead, brown burrs known as "nubbins," or to discolor and prevent the full maturity of the hop, or to discolor to a chocolate brown the petals of the hop (Tr. 144, 145, 367, 368).

The plaintiff first noticed downy mildew in his cluster yard about August 1 (Tr. 141), and by the middle of August about five per cent of his cluster crop was affected by mildew (Tr. 144). At harvest time his 1947 cluster crop was more heavily affected by downy mildew than any previous crop (Tr. 185). The plaintiff acknowledged at the trial that this mildew damage appeared in the baled hops (Tr. 146).

The plaintiff harvested and baled his entire cluster crop, making no effort to avoid the hops affected by mildew (Tr. 140). He did this on his own initiative and without consulting the defendant (Tr. 158).

The defendant's first examination of any of the cluster hops was during harvest early in September, when Lamont Fry, an employee of the defendant's Oregon representative, looked at a handful of unbaled hops in the cooling room of the plaintiff's hop house (Tr. 159-161, 293). Mr. Fry did not, however, go into the hop yard (Tr. 294).

When part of the crop had been baled and placed by plaintiff in a warehouse, Mr. Fry drew two "type" samples of about one pound each (Tr. 294, 295, 347), which were sent to the defendant in New York (Tr. 100, 295). The defendant examined these samples and advised Mr. Paulus, its Oregon representative, that they were of

fair quality but not prime (Exhibits 19, 20, Tr. 85). Thereafter when all the hops, 130 bales, were in the warehouse, three additional type samples were taken and sent to the defendant (Tr. 296, 297, 347; Exhibit 13, Tr. 85), which found them to be of poor quality and badly blighted, and instructed Mr. Paulus to reject such hops (Exhibit 48, Tr. 373). A few days later, and before Mr. Paulus had taken any action on that instruction, the defendant further instructed him to inspect and grade the 130 bales and to send to the defendant 10th bale samples, for the defendant's final decision (Exhibits 17, 23, Tr. 85; Tr. 352-355; Exhibit 30, Tr. 126).

The five type samples which were examined by the defendant in New York are Exhibit 36, A to E (Tr. 371, 374).

Mr. Paulus thereupon informed the plaintiff that the preliminary samples were below the contract standard and that he had instructions to fully inspect the hops and submit to the defendant in New York, representative 10th bale samples for its final decision (Exhibit 4, Tr. 85). Mr. Fry then sampled and weighed the hops in the warehouse, pursuant to written authority by the plaintiff and his express acknowledgment that such acts would not be considered acceptance of the hops (Exhibit 32, Tr. 299, 300). This sampling was done by putting the 130 bales in a line and drawing from each bale a handful of hops, known as "tryings," which were compared with each other to determine whether there was uniformity of grade and condition among all the bales. The bales were then numbered and a large "10th bale sample," weighing about one pound, was cut from each

10th bale, beginning with bale No. 10, or 13 such samples in all. These were compared with the tryings to make sure the 10th bale samples were representative of the entire lot (Tr. 161, 163, 164, 300-303, 389, 498, 499).

Mr. Fry noted that some of the 10th bale samples looked better than the tryings, so he drew additional samples from the opposite side of each bale involved. He found the hops in different parts of those bales to be of different quality or condition, and that the bales were "false packed" (Tr. 305, 306, 310, 317, 389).

A major portion or "split" of each 10th bale sample was mailed to the defendant in New York (Tr. 307; Exhibit 14, Tr. 85), where careful examination revealed that all 13 samples showed clearly a substantial mildew damage. They contained a great many diseased hops or nubbins; they were not of good color, but had an uneven, mottled color due to the brown damaged cones; many of the damaged hops were not fully matured and not in sound condition; the hops in the samples were not in good order and condition (Tr. 433-435, 437). None of the 10th bale samples was considered by the defendant to be of prime quality (Tr. 436), but three of them, from bales 70, 100 and 130, were considered to have a better appearance than the others (Tr. 436). The defendant telegraphed these findings to Mr. Paulus with instructions that although all samples showed many blighted hops the defendant would accept any bales equal to the three better samples, the balance to be rejected as not a prime delivery (Exhibit 26, Tr. 85; Tr. 436, 437).

In addition, Mr. Paulus had general instructions relative to all samples reported by the defendant to be acceptable for delivery, whereby he was required to inspect carefully the lots involved and to reject any bales not fully up to samples or which in his opinion were not of prime quality, and that hops containing considerable blighted burrs were unsatisfactory to the defendant (Exhibit 22, Tr. 85).

Mr. Paulus and Mr. Fry reexamined the samples of the plaintiff's hops in an effort to determine which bales might be accepted as equal to the three better-looking samples referred to by the defendant. They found that although the samples of bales 70, 100 and 130 did look a little better on the surface than the other samples, when broken apart and examined closely they were substantially the same as the others (Tr. 355, 356). Those three samples contained immature, brown nubbins (Tr. 205). Further, Mr. Fry informed Mr. Paulus that he had already reinspected and resampled those bales and found that the hops on the reverse side were the same as all the other bales (Tr. 335, 336, 355).

Mr. Paulus advised the plaintiff that the defendant would consider accepting any hops like the three better-looking samples, and the plaintiff, Mr. Paulus and Mr. Fry together, examined all the samples. The plaintiff agreed that all the samples were substantially the same, and stated that if any particular bales were to be accepted all should be accepted (Tr. 335, 336, 500).

Thereafter, on October 30, 1947, Mr. Paulus on behalf of the defendant notified the plaintiff by letter that

the cluster hops did not meet the requirements of the contract as to grade, quality, character and condition, and therefore could not be accepted, and requested repayment of the $4,000.00 which had been advanced by the defendant to the plaintiff (Exhibit 3, Tr. 85). That advance has not been repaid to the defendant (Tr. 128).

Following rejection of the hops by the defendant, Mr. Paulus at the plaintiff's request attempted to sell the hops to other buyers or to resell them to the defendant at reduced prices, but was not successful (Tr. 120, 121, 337, 338). The plaintiff also attempted to find a buyer (Tr. 121, 131, 208, 209), and during April, 1948, sold and delivered the entire lot of hops for $10,117.51 (Tr. 127, 128, 132, 413).

SPECIFICATION OF ERRORS

The District Court erred:

1. In finding that by the agreement of August 18, 1947, the plaintiff contracted to sell and the defendant contracted to buy the entire crop of cluster hops grown by the plaintiff in 1947 on his farm, and in basing the judgment thereon (Tr. 35). Such finding is clearly erroneous and is unsupported by substantial evidence, as the agreement itself provides that the defendant was required to accept and pay for only those hops which met the standards of quality and condition specified in the agreement (Tr. 10).

2. In finding that pursuant to said contract the plaintiff duly harvested, cured, and baled said hops

grown thereon in said year in a careful and husbandlike manner, and in basing the judgment thereon (Tr. 36). Such finding is clearly erroneous and is unsupported by substantial evidence, as the plaintiff acknowledged that he harvested and baled his entire crop, including hops which he knew to be damaged by mildew (Tr. 140). Furthermore, this finding is wholly irrelevant and immaterial.

3. In finding that the defendant knew that said crop of hops showed some mildew at the time said contract was entered into, and knew that said crop would in normal course show such mildew when picked and baled, and in basing the judgment thereon (Tr. 36). Such finding is clearly erroneous and is unsupported by substantial evidence, as there is absolutely no evidence tending to support it (Tr. 98, 148, 151, 153).

4. In finding that the plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state, and in basing the judgment thereon (Tr. 37). Such finding is clearly erroneous and is unsupported by substantial evidence, as the plaintiff acknowledged that he harvested and baled his entire crop, including hops which he knew to be damaged by mildew (Tr. 140). Furthermore, this finding is wholly irrelevant and immaterial.

5. In finding that the plaintiff, with the assent of the defendant, delivered his baled cluster hops to the warehouse and set them aside for the defendant, and appropriated them to the contract, and in basing the judgment thereon (Tr. 37). Such finding is clearly

erroneous and is unsupported by substantial evidence, as there is no evidence that the defendant expressed any assent whatever, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff. The only evidence on this point is that the defendant, by rejecting the hops, expressed a decided unwillingness to take them as its own.

6. In finding that the plaintiff duly performed all of the terms and conditions of the contract which he was required to perform, and in basing the judgment thereon (Tr. 37). Such finding is clearly erroneous and is unsupported by substantial evidence, if the contract is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

7. In finding that by the term "blighted" it was meant that the hops showed some mildew effect, and in basing the judgment thereon (Tr. 39), if that finding is construed to mean that these hops were rejected because of a slight degree of mildew infestation. Such finding is clearly erroneous and is unsupported by substantial evidence, as the undisputed evidence establishes that the defendant rejected the plaintiff's hops because of substantial damage by mildew (Tr. 433-435, 437).

8. In finding that at the trial the defendant advanced the same specific objection to the hops, that is, that they were blighted, and in basing the judgment thereon (Tr. 39), if that finding is construed to mean that the defendant contended that the degree of mildew infestation

was slight. Such finding is clearly erroneous and is unsupported by substantial evidence, as the evidence is undisputed that the defendant contended at the trial that the plaintiff's hops were substantially damaged by mildew (Tr. 30, 146, 378, 381-384, 436, 481-485, 493-495).

9. In finding that upon the facts the claimed defect was not material, and in basing the judgment thereon (Tr. 39). Such finding is clearly erroneous and is unsupported by substantial evidence, as it is undisputed that if the agreement between the parties is construed in the manner advocated by the defendant, the failure of the plaintiff's hops to meet the standards of grade, quality and condition specified in the agreement, was substantial (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

10. In basing the judgment upon a finding that said cluster hops, when tendered to the defendant, were merchantable (Tr. 39), as hops which are simply merchantable, that is, salable at some price, do not meet the standards of grade, quality and condition specified in the agreement, if it is construed in the manner advocated by the defendant. This finding therefore has no relation whatever to the contract obligation of the plaintiff.

11. In finding that the plaintiff delivered the identical hop crop which the defendant contracted to buy, and in basing the judgment thereon (Tr. 39). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract covered future or unascertained

goods deliverable only after processing (Tr. 8). Furthermore, the defendant agreed to accept and pay for only hops meeting the standards of grade, quality and condition specified in the contract (Tr. 10).

12. In finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered, and in basing the judgment thereon (Tr. 39). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract plainly provides that the defendant was not obligated to accept and pay for any hops tendered to it which did not meet the standards of grade, quality and condition specified in such contract (Tr. 10). In the absence of evidence to the contrary, it must be conclusively presumed that the defendant did rely upon the warranty in the contract; there was no such evidence.

13. In finding that said hops were of substantially the average quality of Oregon cluster hops accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions, and in basing the judgment thereon (Tr. 39, 40). Such finding is clearly erroneous and is unsupported by substantial evidence, and does not form a proper basis for the judgment, as the contract cannot be construed to mean that average quality hops meet the standards of grade, quality and condition specified therein. Furthermore, such finding is wholly irrelevant

and immaterial.

14. In finding that the defendant found that a portion of said hop crop was acceptable, and that, in fact, the entire crop was substantially of the same quality as the part thereof which defendant found acceptable, and in basing the judgment thereon (Tr. 40). Such finding is clearly erroneous and is unsupported by substantial evidence, as there is absolutely no evidence to support it (Tr. 301, 304-306, 309, 310).

15. In finding that said hops, upon tender and delivery, substantially conformed to the quality provisions of the written agreement of August 18, 1947, and in basing the judgment thereon (Tr. 40). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

16. In finding that there had been a material decline in the general market price and demand for 1947 Oregon cluster hops and that the hops here involved could not readily be resold, and in basing the judgment thereon (Tr. 40). Such finding is clearly erroneous and is unsupported by substantial evidence, as this finding is contrary to the undisputed evidence in this case (Exhibit 33, Tr. 285; Tr. 361-363, 416, 419).

17. In finding that the defendant was in default in the payment of the purchase price of said hops and that $15,666.18 was due and owing from the defendant, as the undisputed evidence in this case establishes that, if

this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

18. In deciding that the plaintiff substantially performed all of the terms and conditions of the agreement between the parties on his part to be performed (Tr. 41). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

19. In deciding that the property in said cluster hops passed to the defendant (Tr. 42), as this decision is contrary to law for three reasons: (1) The contract provides that title shall pass to the defendant only when the defendant tenders to the plaintiff the contract price of the quantity of hops accepted by the defendant. No such tender was ever made as the defendant rejected all of the plaintiff's hops. (2) As this was a sale for cash, title did not pass to the defendant as the defendant has never paid for the hops. (3) If this was not a sale for cash or cash on delivery, title did not pass as the hops did not meet the standards specified in the contract and the conditional assent of the defendant to the appropriation of the hops, implied from the delivery of the hops to the warehouse by agreement, was withdrawn by the rejection of such hops.

20. In deciding that the defendant became obligated to pay the plaintiff on or before October 31, 1947, the sum of $21,209.20, being the contract price of $25,209.20 less the advance payment of $4,000.00 (Tr. 42), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

21. In deciding that the defendant wrongfully refused to and did not perform its obligation under said contract of August 18, 1947 (Tr. 42), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

22. In deciding that the measure of the plaintiff's recovery upon the facts in this cause is, under the Oregon law, the difference between the amount claimed to be due under said contract and the amount realized from the resale of the plaintiff's hops (Tr. 40, 41, 42), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference between the contract price of said hops and the market value thereof at the time and place of delivery (Tr. 13). The plaintiff is bound by that provision.

23. In failing and refusing to apply the provision in said contract of August 18, 1947, which fixed and determined the measure of damages as the difference between the contract price of the hops and the market value thereof at the time and place of delivery (Tr. 40, 41, 42), as the plaintiff is bound by that provision.

24. In deciding that the defendant should take nothing under its counterclaim (Tr. 42), as the defendant is entitled to a judgment against the plaintiff on its counterclaim for $4,000.00, the amount of the loan and advance to the plaintiff, in the event of a reversal of the judgment, the said sum not having been repaid to the defendant (Tr. 128).

25. In failing and refusing to grant the motion to dismiss filed on behalf of the defendant (Tr. 23, 26), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference between the contract price of said hops and the market value thereof at the time and place of delivery (Tr. 13). The plaintiff is bound by that provision.

ARGUMENT

Summary of Argument

I. The findings of fact with respect to the quality and condition of the hops tendered by the plaintiff to the defendant, are clearly erroneous and are unsupported by any substantial evidence.

II. The defendant was not bound to take delivery of the plaintiff's hops and was justified in rejecting them.

III. The court erred in concluding as a matter of law that the plaintiff substantially performed all of the terms and conditions of the agreement on his part to be performed, and that the defendant wrongfully refused to and did not perform its obligation under said contract.

IV. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the facts of this case do not bring it within the operation of the provisions of the Uniform Sales Act which permit such an action.

V. The court erred in concluding as a matter of law that the property in the plaintiff's cluster hops passed to the defendant, and that the defendant became obligated to pay the plaintiff the amount due under said contract less the amount realized from the resale of the hops.

VI. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the contract itself precludes that measure of recovery.

VII. The court erred in failing and refusing to grant the defendant's motion to dismiss on the ground stated in paragraph 1 thereof (Tr. 23, 26), and in failing and refusing to sustain the first defense in the defendant's answer (Tr. 28).

VIII. The court erred in concluding as a matter of law that the measure of the plaintiff's recovery upon the facts here is, under Oregon law, the difference be-

tween the amount due under said contract and the amount realized from the resale of the hops.

IX. The defendant is entitled to a judgment against the plaintiff on its counterclaim (Tr. 30), for $4,000, the amount of the advance, in the event the judgment is reversed.

I

THE FINDINGS OF FACT WITH RESPECT TO THE QUALITY AND CONDITION OF THE HOPS TENDERED BY THE PLAINTIFF TO THE DEFENDANT, ARE CLEARLY ERRONEOUS AND ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE

The defendant contends that no substantial evidence was introduced tending to establish that the hops tendered by the plaintiff to the defendant met the standards of quality and condition specified in the contract of sale.

The contract contains this provision with respect to quality and condition (Tr. 8):

> "Such hops shall not be the product of the first year's planting, and not affected by spraying or mold, but shall be of prime quality, in sound condition, good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition."

The portions of the Findings of Fact claimed to be clearly erroneous and not supported by any substantial evidence, will be considered in some detail.

1. Paragraph 12 of Findings of Fact (Tr. 39, 40):

> "Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions. * * * Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said agreement."

These findings are really three in number. They can be more readily understood and discussed if rephrased as follows:

(a) Hops which are of average quality and condition conform to the warranty contained in the contract.

(b) The plaintiff's hops were of average quality and condition, and conformed to the warranty.

(c) The plaintiff's hops were substantially equal in quality to cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions.

1. Paraphrase of Paragraph 12 of Findings of Fact (Tr. 39, 40):

(a) Hops which are of average quality and condition conform to the warranty contained in the contract.

The plaintiff attempted to establish that the term "prime quality" found in the warranty means "average quality for the year in which the hops are grown, in the Willamette Valley" (Tr. 179, 188, 189, 239). One wit-

ness who testified for the plaintiff, however, acknowledged that "prime quality" hops are those which are well grown, harvested and cured, of good even color, and free of damage by vermin or disease (Tr. 259).

The defendant introduced testimony which establishes that the expression "prime quality" means exactly what the rest of the warranty specifies, in other words, that the term "prime quality" must be deemed to mean hops which are not the product of the first year's planting and not affected by spraying or mold but which are in sound condition, good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition (Tr. 395, 396, 410, 411, 428, 429). The expression "prime quality" also means that the hops must be free of damage by disease, such as mildew (Tr. 259, 399, 401, 402, 410, 411, 433).

The witnesses produced by the defendant who testified to the meaning which should be given to the words "prime quality," were men who have been in the hop business in Oregon for many years as growers and buyers. Their testimony establishes that the expression "prime quality," were men who have been in the hop which is the same in California, Oregon and Washington, and is the same from one year to the next. This definite standard has been applied in each of these states for many years (Tr. 278, 279, 403, 412, 429, 431).

That the defendant's contention with respect to the meaning which should be given to the term "prime quality," is correct, is amply demonstrated by two decisions

of the Supreme Court of Oregon and one decision of the United States Circuit Court for the District of Oregon.

Netter v. Edmunson, 71 Or. 604, 143 Pac. 636, was an action to recover advances made by the buyer to the grower. The principal issue was whether the hops tendered to the plaintiff and rejected by him, were of the quality specified. The contract described the hops to be delivered in these words:

> "The said hops covered by this instrument shall be of first quality, i.e. of sound condition, good and even color, fully matured, but not overripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage. Said hops shall not be the product of a first year's planting."

In discussing whether the trial court ruled correctly in admitting testimony of an expert witness with respect to a chemical analysis of the hops involved, the court said that the contract "defined the hops to be produced in terms which must be taken as the yardstick by which to measure their quality." (See Appendix 1.)

The Supreme Court also considered whether certain instructions requested by the plaintiff concerning quality and condition, should have been given. In that connection, the court said, "We think the description of the hops as specified in the contract was determinative of their quality." (See Appendix 2.)

These quotations indicate plainly that the terms "first quality" and "prime quality" in contract provisions such as these, are to be construed in conformity

to the remaining specific requirements in such provisions, and that hops cannot be of "first quality" or "prime quality" unless they meet those specific requirements.

Wigan v. La Follett, 84 Or. 488, 165 Pac. 579, was also an action to recover advances made pursuant to a hop contract, the plaintiff having rejected the hops tendered. Here the issue was whether the hops tendered were of "prime quality." The trial court instructed the jury to "accept the definition of prime quality as laid down in this contract by the parties themselves." This instruction was approved by the Supreme Court. (See Appendix 3.)

Lilienthal v. McCormick, 86 Fed. 100, is also believed to be of great importance for the reason that the Circuit Court for the District of Oregon decided that hops of a quality equal to the average of the best produced, did not comply with the terms of the contract which required the hops to be "of choice quality, and in sound condition, of good color, fully matured, etc." That was a suit in which the plaintiff, the buyer, sought a lien upon certain hops of the defendant, the seller, to the extent of advances made to the latter. In sustaining an exception to the defendant's answer, the court said that the allegation that the crops tendered were an average of the best product of said crops so produced did not answer the contract, by which the defendants bound themselves to deliver hops of choice quality, and in sound condition, of good color, fully matured, etc. (See Appendix 4.)

The decree entered by the court in that case was affirmed by the Circuit Court of Appeals in *Lilienthal v. McCormick,* 117 Fed. 89.

The defendant contends that these authorities establish that the term "prime quality" does not mean "average quality for the year in which grown," but that it does mean that the hops shall not be the product of the first year's planting and they shall not be affected by spraying or mold, but shall be of good color, fully matured, cleanly picked, free from damage by vermin or disease, properly dried, cured and baled, and in good order and condition.

This conclusion is supported by certain practical considerations which are of great importance.

In the first place, if the term "prime quality" means "the average quality for the year in which grown, in the Willamette Valley," it follows that if all or nearly all of the hops in the Willamette Valley are badly damaged by mildew in any year, the buyers are bound to accept badly damaged hops from the Oregon growers in that year, regardless of the fact that such buyers are either obligated to deliver to brewers hops of top quality, or would be unable to sell hops of any other grade than top quality. If the buyers are bound to take badly damaged hops simply because they are average hops for the year, in the Willamette Valley, buyers are bound to take hops at the contract price which they will not be able to sell.

This means that the buyers, who have no control whatsoever over the hops, would have to assume the

risk of a poor year and pay top prices for a product which they would not be able to sell or which would bring reduced prices at best. It is true that growers do not have complete control over the quality of hops produced by them, but they have elected to engage in the business of growing hops and from time immemorial farmers and growers of all products have had to assume the risk of poor crops.

It was the plaintiff and not the defendant who undertook to harvest, cure and bale the good hops on the vines. It was the plaintiff and not the defendant who assumed the risk of growing, harvesting, curing and baling the hops in such a manner as to make certain that they were good hops when baled.

The contract itself clearly contemplates that the plaintiff should assume the risk of growing, harvesting, curing and baling hops of the quality and condition warranted. It is expressly provided in paragraph "Second" (Tr. 10), that the defendant should have the right to inspect the baled hops delivered to the warehouse, and to reject those not meeting the warranty.

Section 281 of the Restatement of the Law of Contracts, clearly indicates that in the absence of an agreement to the contrary, it is the grower who assumes the risk of a crop failure, and not the buyer. (See Appendix 5.)

In the second place, if a buyer of prime quality hops must accept average hops, the freedom of the buyer to contract for future requirements would be so seriously impaired as to be very nearly destroyed. No

brewer would purchase his requirements without a guarantee of quality, and it is equally true that no buyer would undertake to meet the guarantee without protection in his contracts with growers.

Finally, if "prime quality" means "average quality grown during a particular year," there is an inconsistency in the contract in that a quantity of hops might be acceptable as average hops and at the same time wholly unacceptable because not of even color, or not well and cleanly picked, or because not free of damage by disease.

It is well settled, of course, that all the terms of a contract must be taken into account in determining its meaning, and that all must be harmonized, if possible.

> *Hardin v. Dimension Lumber Co.,* 140 Or. 385, 13 Pac. 2d. 602.

The application of that principle requires a determination that the term "prime quality" cannot be held to mean the "average quality of hops for the year in which grown."

It is respectfully contended on behalf of the defendant that these authorities establish that the term "prime quality" must be construed in the manner advocated by the defendant, that is, it means exactly what the remaining terms in the warranty specify.

1. Paraphrase of Paragraph 12 of Findings of Fact (Tr. 40):

(b) The plaintiff's hops were of average quality and condition, and conformed to the warranty.

Witnesses produced by the plaintiff testified that his hops were of "average" quality or "good average" quality (Tr. 176, 210, 222).

The plaintiff, on direct examination, testified that his hops were of prime quality (Tr. 134), but during cross-examination he admitted that what he meant by the term "prime quality" was "average quality for the year in which grown, in Oregon" (Tr. 175, 176). He testified that his hops were equal to the average produced in Oregon during 1947 (Tr. 134, 135, 174, 175).

All of this testimony was directed to the question whether the plaintiff's hops were of average quality for the year in which grown, in the Willamette Valley. None of it had any bearing on the real issue whether the plaintiff's hops were of "prime quality" as that term is defined in the warranty.

The testimony introduced by the defendant, on the other hand, establishes that this plaintiff's hops were heavily damaged by mildew (Tr. 378), and that they were therefore not of prime quality, and were not "in sound condition," or of "good color," or "fully matured," or "in good order and condition," as expressly required by the contract (Tr. 8, 433, 434, 483, 484, 490, 494, 495).

The analysis made by Mr. G. R. Hoerner, bacteriologist of the Oregon State College and U. S. Department of Agriculture, specializing in a study of downey mildew in hops, is of great significance. The hop samples furnished to Mr. Hoerner were separated by him for this test in the same manner as that used by the Federal-State Inspection Service in making the determination

of leaf and stem content which is accepted by both growers and buyers throughout the hop industry in this area as a factor in the determination of prices (Tr. 376, 478, 479). Mr. Hoerner's test produced the following results: 70.1% by weight of one sample showed infected burrs, petals and nubbins; 60.44% by weight of the other sample showed infected burrs, petals and nubbins (Tr. 378, 381, 503). An examination of Exhibit 49C (Tr. 373, 377) and Exhibit 50E (Tr. 373, 380) will demonstrate beyond any doubt that the infected portions of these two samples were not simply exterior petals and that these hops were heavily and seriously damaged by mildew.

The samples thus analyzed by Mr. Hoerner were from among the original 10th bale samples drawn from the bales when the hops were first sampled at the warehouse (Tr. 318, 319, 321). One of these was among those which had been sent to the defendant's New York office and had been examined by Mr. Oppenheim there. It was representative of all of the 10th bale samples (Tr. 339, 340).

Mr. Hoerner also examined on the witness stand four additional 10th bale samples. Two of these he found to show many mildewed, diseased hops and nubbins (Tr. 382, 383), and the others to show definite evidence of mildew (Tr. 384).

These tests were strongly supported by the testimony of the witnesses produced by the defendant. Mr. Ray and Mr. Farmer examined all of the 10th bale samples which were produced in court, 13 in number. Mr. Ray

testified that, with the exception of one sample which might be regarded as of prime quality by stretching, these hops could not possibly be of prime quality because of the mildew damage (Tr. 481, 482, 483). He said that they contained a very considerable number of nubbins and that there was no reasonable chance among experts for a difference of opinion (Tr. 483, 484). Mr. Franklin testified that these hops were seriously damaged by mildew and were not of prime quality (Tr. 493, 494, 495). Mr. Oppenheim, president of the defendant, testified that he personnally examined these samples and rejected the hops because the samples contained a great many hops blighted by mildew. He said that the color of the individual undamaged hops was reasonably good but added that the color of the crop as baled was not good because of the nubbins and other mildew damage (Tr. 433, 434).

The one sample referred to by Mr. Ray as being better than the others, was undoubtedly taken from a bale in which the hops were not uniform in quality and condition. This is discussed under this heading I, subdivision 3.

It will be evident that the plaintiff's witnesses directed their testimony to the question whether his hops were of average quality, and that the defendant's witnesses directed their testimony to the question whether such hops were of "prime quality" as that term is defined in the warranty itself.

It is equally evident that if the court construes this contract in the manner advocated by the defendant, it

must be said that there is no substantial evidence tending to establish that the plaintiff's hops were of prime quality.

1. Paraphrase of Paragraph 12 of Findings of Fact (Tr. 40):

(c) The plaintiff's hops were substantially equal in quality to cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions.

In the first place, it is well settled that evidence of collateral transactions is not relevant when offered to establish the terms of a contract between the parties or that it was breached by one of them, for the reason that the rights of the parties can not be affected or concluded by such collateral transactions.

Chapman v. Metropolitan Life Ins. Co., 172 S.C. 250, 173 S.E. 801.

Agri Mfg. Co. v. Atlantic Fertilizer Co., 129 Md. 42, 98 Atl. 365.

Johnson v. Associated Oil Co. of California, 170 Wash. 634, 17 Pac. 2d. 44. (See Appendix 6.)

In the second place, there is no evidence in support of the finding now being considered, except such as is so indefinite as to be wholly meaningless.

2. Paragraph 11 of Findings of Fact (Tr. 39):

"Said hops when tendered were merchantable."

It may be assumed that this finding of merchantability should be construed to mean that the plaintiff's hops were of average quality and condition, and that the defendant was therefore bound to take them, as there is an express finding to that effect in Paragraph 12 (Tr. 39, 40). If so, it adds nothing to the latter.

If this finding of merchantability is construed to mean something else, there is only one clue in the findings to its proper construction.

All we know is that the court must have intended to find that the hops were not of "prime quality," if that expression is given the meaning advocated by the defendant.

That conclusion is supported by these facts which can be verified by referring to the Finding of Facts and Conclusions of Law on file in this cause:

Counsel for the plaintiff proposed this finding with respect to quality and condition:

> "Said 1947 crop hops produced by plaintiff on said premises and tendered to the defendant under said contract were merchantable, were not affected by mold, were in sound condition and in good order and condition, and were substantially fully matured, of good color, and of prime quality."

The court struck out those words and inserted this finding in their place, in longhand:

"Said hops when tendered were merchantable."

This finding is subject to such broad and varied interpretations that it has no materiality in this litigation.

Furthermore, the word "merchantable" is not used in the warranty appearing in the contract nor is there any evidence ascribing to it any meaning by custom or usage, or otherwise.

The testimony shows that on some occasions when hops failed to meet the quality requirements of contracts, the buyers accepted them at reduced prices. In fact, the testimony indicates that in 1947 a considerable portion of the mildew-affected crop was sold at reduced prices. When hops failed to meet the quality provisions of contracts, it was simply a matter of negotiation of new "spot" sales at prices lower than provided in the contracts and based upon the lower quality of the hops (Tr. 337, 338, 439, 445, 446). Consequently, when it is said that a particular lot of hops is "merchantable," that means simply that the hops are salable at some price, either the market price of prime quality hops, or some other price possibly substantially less than that figure.

This finding that the hops were "merchantable" is just as immaterial as the allegation in *Lilienthal v. McCormick,* 86 Fed. 100, that the grower's hops were equal in quality to the "average of the best product of the crop produced." With respect to that allegation, the court said:

> "The allegation that the crops tendered were an average of the best product of said crops so produced does not answer the contract, by which the defendants bound themselves to deliver hops of choice quality, and in sound condition, of good color, fully matured, etc."

The two Oregon cases dealing with the construction to be placed on the warranty in this contract, *Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636, and *Wigan v. LaFollett,* 84 Or. 488, 165 Pac. 579, also establish that the finding of merchantability in the present case has no bearing upon this controversy.

In *Netter v. Edmunson,* supra, the court made this statement:

> "Therefore, the contract under consideration defined the hops to be produced in terms which must be taken as the yardstick by which to measure their quality."

In *Wigan v. LaFollett,* supra, the court said:

> "You are to accept the definition of prime quality as laid down in this contract by the parties themselves."

It follows that the finding of merchantability is wholly immaterial as it does not determine any issue in this case.

3. Paragraph 12 of Findings of Fact (Tr. 40):

> "Defendant found that a portion of said crop was acceptable, and in fact the entire crop was substantially of the same quality as the part thereof which defendant found acceptable."

There is not the slightest evidence in support of that finding.

It is true that when the 10th bale samples, 13 in number, were submitted to Mr. Oppenheim, he stated that numbers 70, 100, and 130 appeared to be better

than the other 10, and notified Mr. Paulus, his representative in Oregon, that he was willing to accept any bales reasonably free of blighted hops and equal to these three samples (Tr. 473; Exhibits 23, 26, Tr. 85). Mr. Paulus then checked with Mr. Fry, his employee, who had drawn these samples of the plaintiff's hops. Mr. Fry reported he had taken another sample from the other side of each of these three bales and found that these new samples did not measure up in quality to the samples taken originally from those bales, showing that those bales were not of uniform quality (Tr. 301, 304, 305, 306, 309, 310).

In his testimony describing this lack of uniformity in these three bales, Mr. Fry used the term "false packed" (Tr. 309). On rebuttal, the plaintiff testified that he had never heard the term "false packed" until "last week in Portland," presumably when the deposition of Mr. Fry was taken (Tr. 497). The important fact, however, is that Mr. Fry made the additional test of each of the three bales mentioned, with the result noted, and not whether he used the term "false packed" or any other term in describing those results. While this plaintiff may have denied that he ever heard that term before, he did not deny that Mr. Fry made the test referred to or that such test produced the result stated. He did not deny that Mr. Fry did what he said he did, or found what he said he found. He acknowledged, in fact, that such a re-sampling may have been made (Tr. 501).

4. Paragraph 11 of Findings of Fact (Tr. 39):

"By the term 'blighted' it was meant that the hops showed some mildew effect as stated above."

If, by the use of the word "some," counsel for the plaintiff who drafted these findings, intended to convey the impression that the defendant rejected these hops on the ground that they were infected with mildew in a minor degree, this finding is without any evidence whatever in its support. The testimony of several witnesses produced by the defendant establishes that the plaintiff's hops were heavily infected with mildew (Tr. 375-386, 407, 482-485, 492-495). One of the witnesses who so testified was Mr. Oppenheim, president of the defendant. It was he who rejected these hops because of the serious nature of the blight (Tr. 433, 434, 465), and the correspondence introduced in evidence so indicates (Exhibits 17, 19, 22, 23, 26, Tr. 85; Exhibits 47, 48, Tr. 373).

One other finding should be challenged as it was intended to cast doubt upon the good faith of the defendant in rejecting the plaintiff's hops. That finding, in paragraph 13 (Tr. 40), is in these words: "There had been (presumably prior to the rejection of the plaintiff's hops by the defendant on or about October 30, 1947), a material decline in the general market price and demand for 1947 Oregon cluster hops."

No evidence whatever was introduced in support of that finding. The market price of hops did not decline prior to the latter part of November, 1947. Mr. R. M. Walker, who was produced as a witness by the plaintiff,

acknowledged that the market price of prime hops remained at 85¢ and 90¢ until the end of November, 1947 (Tr. 246). Mr. Ray and other witnesses testified that there was a scarcity of prime quality hops in 1947 and that there was a good market for them throughout 1947 (Tr. 362, 405, 470, 475, 476), and that the market price for hops of the type then available began to decline during the latter part of November (Tr. 246, 247; Exhibit 33, Tr. 285).

5. Paragraph 11 of Findings of Fact (Tr. 39):

"Upon the facts the claimed defect (that the plaintiff's hops were blighted) was not material."

While the materiality of the objection advanced by the defendant is probably a mixed question of law and fact, it is clear that, insofar as the finding is one of fact, it is unsupported by any substantial evidence.

The oral testimony produced by the defendant shows that the plaintiff's hops were seriously or heavily damaged by mildew. The test conducted by Mr. Hoerner of Oregon State College, shows that from 60% to 70%, by weight, of the samples of the plaintiff's hops tested by him, consisted of infected burrs, petals and nubbins (Tr. 378-382).

6. Paragraph 12 of Findings of Fact (Tr. 39):

"Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid."

There is no testimony whatever which remotely tends to support that finding. Both of these parties signed this contract containing the express warranty we have been considering, and it must be conclusively presumed that the defendant would not have entered into this contract if it had not expected and desired to receive prime quality hops, at least in the absence of substantial proof to the contrary. There was no such evidence.

In this connection, it seems advisable to challenge an additional finding, in paragraph 4 (Tr. 36): "Defendant knew that said hop crop then (when the parties entered into the contract) showed some mildew and would in normal course show such mildew when picked and baled."

This finding is likewise without any support in the testimony. The plaintiff himself admitted that he did not know whether any one representing the defendant saw the plaintiff's hops on the vines before or at the time the contract was signed (Tr. 98, 148, 151, 153).

The plaintiff further acknowledged that he did not inform the defendant or any of its representatives that his cluster hops were affected by mildew, although he knew when the contract was signed that at least 5% of his cluster hop yard was affected (Tr. 141-144, 152). The only time anyone representing the defendant saw any of the plaintiff's cluster yard, in 1947 prior to the execution of this contract, was early in August when Lamont Fry drove past about 300 feet of the yard (Tr. 291, 292). There is no evidence that mildew in that yard was then noticed by, or was known to Mr. Fry.

7. Paragraph 3 of Findings of Fact (Tr. 36):

"Pursuant to said contract, plaintiff cultivated and completed the cultivation of said premises and duly harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner."

8. Paragraph 7 of Findings of Fact (Tr. 37):

"Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state * * *."

9. Paragraph 7 of Findings of Fact (Tr. 37):

"Plaintiff duly performed all of the terms and conditions of the agreement between the parties on his part to be performed."

If what has been said in the argument under this heading I is correct and sound, the plaintiff did not do everything that he was bound to do under the contract, in that he failed to tender hops of prime quality. If he used the utmost care, he must still suffer the penalty of rejection as his hops did not comply with the warranty.

If the court construes the term "prime quality" to mean what the other expressions in the warranty specify, and to mean that the hops must be free of damage by mildew, it follows from what has been stated herein that the plaintiff has produced no evidence whatever that his hops met the standards of quality and condition expressed in the contract of sale.

The defendant respectfully contends that under these circumstances the findings discussed herein are clearly erroneous and should be set aside by reason of Rule 52 (a), Federal Rules of Civil Procedure, Title 28, U.S. C.A., following Section 723c.

This court has held, in conformity to a decision of the United States Supreme Court, that a finding of fact is not conclusive and is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

> *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766.
> *Grace Bros., Inc. v. Commissioner of Internal Revenue,* 173 Fed. 2d. 170 (C.A.-9).
> *Lassiter v. Guy F. Atkinson Co.,* 176 Fed. 2d. 984 (C.A.-9).

In *United States v. United States Gypsum Co.,* supra, the Supreme Court set aside a number of findings of fact made by the District Court on the ground that they were clearly erroneous.

The defendant respectfully contends that the present case is one in which the evidence is such as to create a definite and firm conviction that a mistake has been made, and that these findings likewise should be set aside.

II

THE DEFENDANT WAS NOT BOUND TO TAKE DELIVERY OF THE PLAINTIFF'S HOPS AND WAS JUSTIFIED IN REJECTING THEM

Assuming that the conclusions stated in the argument under heading I are sound and that the hops tendered to the defendant did not meet the standards

of quality and condition specified in the contract of sale, the defendant was not bound to take delivery of such hops and was justified in rejecting them.

It is well settled that goods must be of the quality described in the contract; if they are not, the buyer is not bound to accept them and can refuse to receive them.

Wright v. Ramp, 41 Or. 285, 68 Pac. 731. (See Appendix 7.)

Barron County Canning & Pickle Co. v. Niana Pure Food Co., 191 Wis. 635, 211 N.W. 764.

Corbett v. A. Freedman & Sons, Inc., 263 Mass. 391, 161 N.E. 415.

A buyer has a right to performance of the contract of sale in accordance with its terms, and it is no excuse to the seller that some other performance should be just as satisfactory or serviceable. This is established by the following decisions which are briefly discussed.

Netter v. Edmunson, 71 Or. 604, 143 Pac. 636. This was an action to recover advances made to a hop grower, in which the latter counterclaimed for damages sustained through the failure of the buyer to accept his hops. The court said that while an application of scientific methods may have demonstrated that the rejected hops would have made excellent beer, equal to that made with first quality hops, the defendants were still under a legal obligation to deliver to plaintiffs hops of the kind and quality described in the contract. (See Appendix 1.)

Hurley Gasoline Co. v. Johnson Oil Refining Co., 118 Okla. 26, 246 Pac. 438. The contract called for a specified grade of gasoline, the description of which stated about six different requirements, one of which was that the gasoline should be "water white." The gas actually shipped was yellow. The trial court held as a matter of law that the gas shipped was not of the quality required. This conclusion was upheld on appeal. (See Appendix 8.)

Niederhauser v. Jackson Dairy Co., 213 Ia. 285, 237 N.W. 222. The buyer was held to have been justified in refusing to accept milk tendered to him on the ground that the seller failed to have his cows given a tuberculin test as agreed. The court reached this decision in spite of the fact that tests conducted after the rejection of the milk disclosed that the seller's herd was free from tuberculosis.

Welch v. T. M. Warner Co., 47 Fed. 2d. 232 (C.C.A. 2). In an opinion written by Judge L. Hand, the court decided that a seller must tender goods of the described quality, and that it is insufficient that a substitute tendered by the seller is substantially as serviceable as the goods stipulated. Many cases are cited in this opinion.

A number of decisions will be cited herein and briefly discussed, to demonstrate that the defendant was justified in rejecting the plaintiff's hops.

Klinge v. Farris, 128 Or. 142, 268 Pac. 748, 273 Pac.

954. The seller was bound to furnish foxes having 50% silver. The court held that foxes having 25% silver did not meet the specifications of the contract.

Lilienthal v. McCormick, 86 Fed. 100 (Circuit Court for the District of Oregon). The court held that hops of a quality equal to the average of the best produced, did not comply with the terms of the contract which required the hops to be "of choice quality, and in sound condition, of good color, fully matured, etc."

Hageman v. Ule, 188 Wis. 617, 206 N.W. 842. The seller was required to furnish gravel without any sand content. A quantity of gravel when first tendered to the buyer contained from 5% to 20% of sand. This material was then rescreened and the amount of sand materially reduced. The court held, however, that even in that condition it did not comply with the terms of the contract.

Hurley Gasoline Co. v. Johnson Oil Refining Co., 118 Okla. 26, 246 Pac. 438. The gas shipped by the seller failed to meet the contract specifications in only one respect, yet the trial court held that this gas was not of the quality required. This conclusion was upheld on appeal, the court saying:

> "Where an article is sold according to a particular description, and the thing delivered is not according to the description, it is a non-performance of the contract upon the part of the seller."

Swift & Co. v. Aydlett, 192 N.C. 330, 135 S.E. 141. The contract called for a commercial fertilizer of a guar-

anteed chemical analysis. The fertilizer delivered contained ingredients of a different analysis. The court held that the buyer was not obligated to accept it, saying:

> "A vendor, who, by his contract, has agreed to sell and deliver to his vendee commercial fertilizer cannot recover of his vendee the purchase price of said fertilizer unless in his action to recover same, he alleges and proves delivery, pursuant to his contract, of commercial fertilizer containing chemical ingredients of the analysis guaranteed, as required by statute."

Myers v. Anderson, 98 Colo. 394, 56 Pac. 2d. 37. The seller here was obligated by contract to furnish milk having a bacteria count no greater than allowed by city ordinance. The milk furnished had a higher bacteria count. The court held as a matter of law, reversing the trial court, that the buyer was not bound to accept the milk furnished.

Baker v. J. C. Watson Co., 64 Idaho 573, 134 Pac. 2d. 613. The court said:

> "If the contract was for U. S. No. 1's (peaches) appellant (buyer) was required to accept only peaches of such grade."

Peck v. Hixon, 47 Idaho 675, 277 Pac. 1112. The contract here required the seller to deliver 116 "white-faced and Durham" steers. The seller tendered among the entire number, three or four Angus and several Jerseys. The court held that the buyer was not obligated to accept the steers tendered, saying:

> "There was not a substantial compliance by appellant (seller) with the requirement of the contract as to the kind of steers called for. It was not sufficient that those not of the quality stipulated were in fact merchantable. Respondents (buyers) were required to take only 'white-faced and Durham' steers."

Central Wisconsin Supply Co. v. Johnston Bros. Clay Works, 194 Ia. 1126, 190 N.W. 961. In that action for the price, a judgment based upon a directed verdict for the defendant, was affirmed on appeal. The plaintiff agreed to deliver "Harrisburg, Ill., 2″ lump coal." The basis for the decision was that there was no evidence that the plaintiff tendered that kind of coal.

U. S. Electric Fire-Alarm Co. v. City of Big Rapids, 78 Mich. 67, 43 N.W. 1030. The plaintiff contracted to install for the defendant an alarm bell having a tone of A below middle C. The bell furnished had a tone of E flat, but it was perfect in every other respect. There was evidence that this bell was not suitable because it could not be heard easily by the city firemen in their homes or places of business. The court held that the defendant was not liable for the price.

It is respectfully contended on behalf of the defendant that these authorities establish that inasmuch as the hops tendered to the defendant were not of the kind, quality and condition described in the contract, the defendant was not bound to accept delivery of such hops and was justified in rejecting them.

III

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PLAINTIFF SUBSTANTIALLY PERFORMED ALL OF THE TERMS AND CONDITIONS OF THE AGREEMENT ON HIS PART TO BE PERFORMED, AND THAT THE DEFENDANT WRONGFULLY REFUSED TO AND DID NOT PERFORM ITS OBLIGATION UNDER SAID CONTRACT

This is established by the argument under headings I and II, which is incorporated herein by reference.

IV

THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE FACTS OF THIS CASE DO NOT BRING IT WITHIN THE OPERATION OF THE PROVISIONS OF THE UNIFORM SALES ACT WHICH PERMIT SUCH AN ACTION

An action for the price can be maintained only when authorized by Section 63 of the Uniform Sales Act, Section 71-163, O.C.L.A. (See Appendix 9.)

Dodd v. Stewart, 276 Pa. 225, 120 Atl. 121.

Henry Glass & Co. v. Misroch, 239 N.Y. 475, 147 N.E. 71.

Funt v. Schiffman, 115 N.Y. Misc. 155, 187 N.Y. S. 666.

Section 63(3) of the Uniform Sales Act

Section 63(3) of the Act, Section 71-163(3), O.C.L. A., does not authorize a recovery of the price in this action for the reason that no attempt was made at the trial to prove that the plaintiff notified the defendant that the hops would thereafter be held by the plaintiff as bailee for the defendant. There is not the slightest evidence in this case that the plaintiff gave such notice to the defendant.

Notification to the buyer that the seller holds the goods as bailee for him, is essential to a recovery under Section 63(3).

Cohen v. La France Workshop, Inc., 112 Pa. Super. 307, 171 Atl. 90.

The burden of proof is on the seller to establish that he gave such notice to the buyer; and if he fails to meet that burden, he is not entitled to a recovery under this section.

Western Hat & Manufacturing Co. v. Berkner Bros., Inc., 172 Minn. 4, 214 N.W. 475.

J. & W. Tool Co. v. Schulz, 140 N.Y. Misc. 652, 251 N.Y.S. 509.

Inasmuch as the giving of notice by a seller to a buyer after the rejection of the goods sold to the latter, that the seller will thereafter hold the goods as bailee for the buyer, is essential to a recovery under Section

63(3) of the Act, it follows that the plaintiff is not entitled to a recovery under that Section.

Section 63(1) of the Uniform Sales Act

Section 63(1) of the Act, Section 71-163(1), O.C.L.A., does not authorize a recovery of the price in this action for the reason that the property in the hops referred to in the plaintiff's complaint has not passed to the defendant within the meaning of that section.

Section 19 of the Uniform Sales Act, Section 71-119, O.C.L.A., contains a number of rules which are applied, unless a different intention appears, in determining when it can be said the parties intended title to pass to the buyer. (See Appendix 10.)

Section 20(1) of the Act, Section 71-120(1), O.C.L.A., declares that the seller may, in the contract of sale, reserve the right of possession or title to the goods until certain conditions have been fulfilled. (See Appendix 11.)

The defendant contends that when these provisions of the statute are applied to the facts of this case, it must be concluded that title to the hops referred to in the complaint has not passed to the defendant. This conclusion is based upon these three detailed contentions:

1. The parties agreed in their contract that title should pass upon the happening of a certain event: the giving of a notice by the defendant tendering the price of the hops accepted. This was never done as all were rejected.
2. This transaction was a sale for cash, and title

has never passed to the defendant for the reason that the defendant has never paid for these hops.

3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

An explanation of these three contentions is desirable. 1 and 2 are not dependent in any way upon a finding that the defendant was justified in rejecting the plaintiff's hops. These two contentions are operative if such rejection was wrongful. The acceptance of either 1 or 2 is a sufficient basis for a reversal of this judgment and the entry of a judgment for the defendant. 3 is dependent upon a finding by this court that the defendant was justified in rejecting the plaintiff's hops, but 3 need not be considered if either 1 or 2 is sustained. The acceptance of 3 is likewise a sufficient basis for a reversal of the judgment and the entry of a judgment for the defendant.

1. The parties agreed in their contract that title should pass upon the happening of a certain event: the giving of a notice by the defendant tendering the price of the hops accepted. This was never done as all were rejected.

By the use of the words, "Unless a different intention appears," Section 19 of the Act, Section 71-119, O.C.L.A., declares that if the parties agree when title shall pass, such agreement is binding upon both the seller and the buyer, and the Rules found in Section 19 have no application.

Such is the construction placed upon this section by the courts:

Jeffries v. Pankow, 112 Or. 439, 229 Pac. 903. (See Appendix 12.)

Pulkrabek v. Bankers Mortgage Corp., 115 Or. 379, 238 Pac. 347. (See Appendix 13.)

Western Hat & Manufacturing Co. v. Berkner Bros., Inc., 172 Minn. 4, 214 N.W. 475.

Zone Co. v. Service Transportation Co., 137 N.J. L. 112, 57 Atl. 2d. 562.

The defendant contends that in the contract we are considering in the present case, the parties have agreed when title should pass. We further contend that by virtue of such agreement title has not yet passed to the defendant in this case.

The material portions of the contract are quoted herewith (Tr. 7, 10):

"First—* * * the seller agrees to cultivate and complete the cultivation of about 20 acres of land * * * and to harvest, cure and bale the hops grown thereon in the said year 1947 in a careful and husband-like manner, and the seller does hereby bargain and sell, and upon ten days' notice in writing therefor, agrees to deliver and to cause to be delivered to the buyer, not later than the 31st day of October of said year f.o.b. cars or in warehouse at Mt. Angel, Oregon, * * * entire crop estimated at twenty thousand pounds (20,000 lbs.) of Cluster hops * * *.

* * * * * *

"Second—* * * upon the said buyer giving said notice to deliver as herein fixed tendering to the seller the full amount of the purchase price thereof

> in lawful money, after deducting any advances made and interest thereon, the title and ownership and the right to the immediate possession of the said hops shall at once vest and be in the said buyer."

The defendant contends that the last clause of that quotation must be construed to mean: When the buyer has inspected the hops presented to it by the seller for inspection, has accepted those which measure up to contract specifications, has given the notice mentioned, or request to deliver, and has tendered to the seller the price of the quantity thus accepted, title to the hops accepted passes to the buyer.

It follows that if all the hops presented to the buyer for inspection are rejected by it, title to none of them passes to the buyer. This is true whether the hops are rejected rightfully or without justification.

Certainly it cannot be said in this case that these parties intended that title to the entire crop should pass to the defendant when the crop was taken to the warehouse and presented for inspection. Instead, it must be concluded that it was their intention that title to none of the hops should pass at that time, but that title to those accepted by the defendant should pass when they were accepted and the price of that amount of hops was tendered to the plaintiff. It cannot be said that these parties intended title to any of the hops to pass until it was determined which of them, if any, were to be accepted and paid for by the defendant.

Inasmuch as the defendant did not accept and request delivery of any of the hops presented to it for

inspection, and did not tender to the plaintiff the price of any such hops, title to none of them passed to the defendant.

2. This transaction was a sale for cash, and title has never passed to the defendant for the reason that the defendant has never paid for these hops.

There can be no doubt that this was a sale for cash. The contract so provides, in these words (Tr. 10):

> "The buyer does hereby purchase the above described quantity of said hops and agrees to pay therefor by check, draft, or in lawful money of the United States of America, on the delivery thereof and acceptance by the buyer, and within the time and conditions herein provided, the price or prices as aforestated for each pound thereof which shall be delivered to and accepted by the buyer, * * *."

To state this provision more simply, the contract declares that the defendant shall, after its inspection of the hops, accept those which answer the description or warranty stated in the contract, and pay for that quantity upon acceptance. The words "and pay therefor * * * on the delivery thereof and acceptance by the buyer" can lead to no other conclusion. There is no aspect of a credit transaction in this contract.

There are a number of Oregon cases which establish that under these circumstances title has not passed to the defendant, inasmuch as the defendant has never paid for the hops. Three of these will be discussed herein.

Weyerhaeuser Timber Co. v. First National Bank of Portland, 150 Or. 172, 38 Pac. 2d. 48, 43 Pac. 2d. 1078.

That was a suit to recover the proceeds of several shipments of lumber. The plaintiff sold such lumber to the buyer who resold it and shipped it to the east coast. Before the lumber reached its destination in the east, the plaintiffs, because of the insolvency of the buyer, exercised their right of stoppage in transitu. By agreement of all parties, however, the lumber was released to the eastern purchasers upon payment of the price by them, and it was agreed that all parties should have the same rights in the proceeds as in the lumber itself. The defendant bank had loaned money to the buyer on the security of the shipping documents. The buyer's receiver was also a party defendant.

The original transaction was a cash sale, as the contract provided: "Terms 98% Cash in Exchange for Documents." The court said that the sale was one for cash on delivery of documents and that no credit was extended by the plaintiffs. The court added that the transaction was not altered by the fact that the buyer did not pay cash on delivery of the documents, inasmuch as the plaintiffs did nothing to indicate that they waived their right to immediate payment. In modifying and affirming a decree for the plaintiffs, the court held that title did not pass to the buyer as he failed to pay for the lumber. (See Appendix 14.)

One of the most significant sentences in the last paragraph of that quotation is the one stating that if a seller delivers property pursuant to a cash, or cash on delivery, sale, but the buyer wrongfully violates his promise to pay for the goods, the buyer does not acquire

title. This means that title does not pass to the buyer whether he is justified in refusing to pay for the goods or not, in sales of that type.

Keegan v. Lenzie, 171 Or. 194, 135 Pac. 2d. 717. That was an action brought by the seller of a quantity of lambs, against the defendant who had purchased them from the original buyer. The plaintiff sought to recover the unpaid portion of the price on the ground that the original buyer had not paid him for them and had never acquired title. The court held that the complaint stated a cause of action in assumpsit based upon a conversion by the defendant and a waiving of the tort by the plaintiff. The defendant was a bona fide purchaser and no fraud was alleged on the part of anyone.

The original transaction here also was a sale for cash. The plaintiff alleged in his complaint that an advance payment was made by the buyer and that it was agreed that the remainder of the price would be paid on delivery of the lambs. The court decided that title to the lambs did not pass to the buyer, and that the plaintiff was entitled to recover from the defendant, saying:

> "If, as the court found, the transaction was a cash sale and the parties intended that title should not pass until payment was made, and no payment was made, then title to the property did not pass by mere delivery, and it is immaterial what motive Boylen (the original buyer) had in giving the drafts, or whether he was actuated by fraud or not."

The defendant contended that the delivery of the lambs to the original buyer was an unconditional ap-

propriation of the goods to the contract, citing *John Hancock Mutual Life Insurance Co. v. Lewis Realty Co.,* 173 Wash. 444, 23 Pac. 2d. 572. The court then quoted subdivisions (1) and (2) of Rule 4 of Section 19 of the Act, Section 71-119, O.C.L.A., and Section 20(1) of the Act, Section 71-120(1), O.C.L.A., and then answered this contention of the defendant in these words:

> "The right of property in the goods in this case having been reserved by the contract, *John Hancock Mutual Life Ins. Co. v. Lewis Realty Co.,* supra, is not authority for defendant's contention.
> "We conceive the rule to be that appropriation of the goods to the contract does not by itself effect a transfer of title. Whether or not title passes depends upon the intention of the parties. 24 R.C.L., Sales, sec. 300."

Mogul Transportation Co. v. Larison, 181 Or. 252, 181 Pac. 2d. 139. There the court stated the same rule with respect to the passing of title. (See Appendix 15.)

The following conclusions may be drawn from these three cases:

(a) Where there is a sale for cash, it must be conclusively presumed that the parties intended that title should not pass to the buyer until the price has been paid. It follows that this intention must be given effect and that none of the Rules in Section 19 of the Act, Section 71-119, O.C.L.A., can be applied.

(b) Where there is a sale for cash, it must be said that the seller has reserved the right of property in the goods until payment has been made, within the mean-

ing of Section 20(1) of the Act, Section 71-120(1), O.C. L.A. That section provides that this may be done although the goods are delivered to the buyer or a bailee for the purpose of transmission to the buyer.

It is respectfully contended that since the defendant has not paid for these hops, title to them has not passed to it, and this is true whether the defendant was justified in refusing to pay for them or not.

3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

The defendant contends that there has been no compliance with Section 19, Rule 4(1) of the Act, Section 71-119, Rule 4(1), O.C.L.A., the part of the Act which contains the rules by which it may be determined when title to goods passes from the seller to the buyer in the absence of agreement. (See Appendix 10.)

Two clauses found in Rule 4(1) will be briefly considered.

(a) "* * * goods of that description (stated in the contract) and in a deliverable state are unconditionally appropriated to the contract, * * *."

"That description" means: of the kind, quality, and condition described in the contract. Goods are "in a deliverable state," when by reason of Section 76(4) of the Act, Section 71-176(4), O.C.L.A., "they are in such a state that the buyer would, under the contract, be bound to take delivery of them." (See Appendix 16.)

It is clear, therefore, that title to goods tendered by a seller to a buyer, cannot pass to the latter by operation of Section 19, Rule 4(1), unless the goods so tendered are of such kind, quality and condition that the buyer is bound to take delivery of them, under the contract.

It has already been demonstrated in the argument under headings I and II that the hops tendered to the defendant were such that the defendant was not bound to take delivery of them.

Wright v. Ramp, 41 Or. 285, 68 Pac. 731.

It follows that these hops were not in a deliverable state and that title did not pass upon the appropriation of the hops to the contract.

Corbett v. A. Freedman & Sons, Inc., 263 Mass. 391, 161 N.E. 415.

Baker v. J. C. Watson Co., 64 Idaho 573, 134 Pac. 2d. 613.

(b) "* * * goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, * * *."

It is established that if goods are delivered, with the assent of the buyer, to a carrier for shipment to the buyer, or to a warehouse or other bailee for the buyer, this is deemed to be an appropriation with assent within the meaning of Section 19, Rule 4(1) of the Act, Section 71-119, Rule 4(1), O.C.L.A., and title passes to the buyer upon delivery to the carrier or to the bailee.

It is also established, however, that this is a conditional title. The buyer, in the absence of an agreement to the contrary, is entitled to inspect the goods upon their arrival at their destination or at the warehouse of the bailee, by reason of the provisions of Section 47 of the Act, Section 71-147, O.C.L.A. (See Appendix 17.) In the present case, of course, the defendant was given the right to inspect the hops by the express terms of the contract (Tr. 10).

If the goods delivered to the carrier or to the bailee prove to be, upon inspection, of such kind, quality, or condition that they are not in a deliverable state, they may be rejected by the buyer and the conditional title is defeated with the result that the seller cannot maintain an action for the price.

Kitterman v. Eagle Pine Co., 122 Or. 137, 257 Pac. 815. That was an action for the price of a quantity of lumber sold in part for cash and in part on credit. The sole question presented on the appeal was whether the defendant's right of inspection continued until the lumber reached its destination in the east, or whether that right was lost through failure to exercise it at an earlier time. The plaintiffs, in effect, admitted that the lumber was not of the quality contracted to be sold, as they conceded that judgment should be rendered against them if the defendant's right of inspection continued to the point of final destination. The trial court entered a judgment for the plaintiffs. On appeal this judgment was reversed and a judgment was rendered in favor of the defendant.

The court made the following statement with respect to the question of the passing of title to the defendant:

> "It is true that the title to the lumber passed to the defendant when it was delivered at Grants Pass, but it was a conditional title, subject to be defeated by failure of the seller to deliver the kind and quality of lumber agreed to be sold."

These principles are also established by the courts of other states.

> *Struthers-Ziegler Cooperage Co. v. Farmers Mfg. Co.,* 233 Mich. 298, 206 N.W. 331. (See Appendix 18.)
>
> *Olsen v. McMaken & Pentzien,* 139 Neb. 506, 297 N.W. 830.
>
> *Hostler Coal & Lumber Co. v. Stuff,* 205 Ia. 1341, 219 N.W. 481.

It is clear that in Oregon, at least, their application is limited to sales which are not for cash or cash on delivery. This is settled by the cases discussed in subdivision 2 under this heading IV.

Inasmuch as it has been demonstrated in the present case, in the argument under headings I and II, that the hops tendered by the plaintiff to the defendant were not in a deliverable state and the defendant was not bound to accept delivery of them, the rejection of the plaintiff's hops was justified and the conditional title which passed to the defendant was defeated and terminated, with the result that the plaintiff cannot maintain this action for the price.

One sentence in Paragraph 7 of the Findings of Fact

(Tr. 37), must be challenged:

> "In September, 1947, after said hops had been picked, dried, cured and baled as aforesaid, plaintiff with the assent of the defendant, delivered at Schwab's warehouse in Mt. Angel, Oregon, all of said hops and set same aside for defendant."

This sentence was probably designed by counsel for the plaintiff to meet the requirements of Section 19, Rule 4(1), of the Act, Section 71-119, Rule 4(1), O.C. L.A., which declares that, unless a different intention appears, where there is a contract to sell future goods by description, title to such goods passes to the buyer upon the appropriation of the goods to the contract by the seller with the assent of the buyer. (See Appendix 10.) This finding is subject to two meanings, and is wholly unsupported by the evidence regardless of which is adopted:

(a) The defendant assented to the appropriation of the hops to the contract by agreeing in advance to the delivery of the hops to the warehouse.

If this is the meaning intended, the finding is incomplete, misleading, and contrary to the undisputed evidence. It is established by *Kitterman v. Eagle Pine Co.,* supra, the Michigan, Nebraska and Iowa cases just cited, and *Henry Glass & Co. v. Misroch,* 239 N.Y. 475, 147 N.E. 71, that while delivery to a carrier or warehouse pursuant to agreement, does amount to an appropriation with assent, such assent is subject to withdrawal and is withdrawn if, following an inspection, the goods are rejected because not of the quality or condition described in the contract. In other words, the title

which passes by reason of the implied assent to the appropriation, is conditional and is defeated by a subsequent rejection of the goods based upon their inferior quality or condition.

This is explained by the court in *Struthers-Ziegler Cooperage Co. v. Farmers Mfg. Co.,* supra. (See Appendix 18.)

It is undisputed in the present case that there was a rejection for the reasons stated, consequently it must be said that the assent to the appropriation was withdrawn if the hops were actually of inferior quality or condition.

It must be concluded, therefore, that this finding, as construed in (a), is wholly without evidentiary support if the plaintiff's hops failed to meet the description in the contract.

(b) The defendant actually expressed assent to the appropriation of the hops to the contract, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff.

There is no evidence whatever in support of this finding, as so construed. The only evidence bearing on this question is that the defendant rejected the hops and thereby expressed a decided unwillingness to take them as its own.

It follows that it must be said that title has not passed to the defendant within the meaning of Section 63(1) of the Act, Section 71-163(1), O.C.L.A.

V

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PROPERTY IN THE PLAINTIFF'S CLUSTER HOPS PASSED TO THE DEFENDANT, AND THAT THE DEFENDANT BECAME OBLIGATED TO PAY THE AMOUNT DUE UNDER SAID CONTRACT LESS THE AMOUNT REALIZED FROM THE RESALE OF THE HOPS

This is established by the argument under heading IV, which is incorporated herein by reference.

VI

THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE CONTRACT ITSELF PRECLUDES THAT MEASURE OF RECOVERY

It will be assumed for the purpose of presenting the argument under this heading, that the hops tendered to the defendant were of prime quality, and the defendant breached the contract in rejecting them.

For the convenience of the court, the provision in the contract with respect to the measure of damages in the event of a breach by either party, is quoted in full (Tr. 13):

> "The parties hereto further agree that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages."

A study of the entire contract makes it clear that the "time and place of delivery" referred to in this clause means the time of delivery of the said hops to the warehouse and the place of such warehouse.

The defendant contends that the quoted provision of this contract relating to the measure of damages, is binding upon the plaintiff, and, as a result, that he is precluded from recovering the price of such hops and is limited in his recovery to the difference between the contract price selected by him and the market value at Mt. Angel, Oregon, on the date of delivery of the hops to the warehouse in that city. Inasmuch as the contract price of the plaintiff's hops and the market value of prime quality hops were exactly the same, at the time and place of delivery, the plaintiff was not damaged to any extent whatever and is not entitled to recover anything in this action (Tr. 246, 247, 254, 255, 361, 362, 363, 404, 405, 416, 419; Exhibit 33, Tr. 285). Certainly he is not entitled to recover the price, and he has made no attempt to recover the difference between the contract price and the market value.

The Uniform Sales Act recognizes the right of parties to enter into binding contracts modifying the rights and liabilities created by that Act.

Section 71 of the Act, Section 71-171, O.C.L.A., contains this language:

> "Where any right, duty or liability would arise under a contract to sell or a sale by implication or law, it may be negatived or varied by express agreement or by a course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

This section has been relied upon by the courts to sustain contract provisions specifying a measure of damages different from the measure of damages created by the Act.

> *International Milling Co. v. North Platte Flour Mills,* 119 Neb. 325, 229 N.W. 22.
>
> *The Christian Mills, Inc. v. Berthold Stern Flour Co.,* 247 Ill. App. 1.
>
> *Crandall Engineering Co. v. Winslow Marine Ry. & Shipbuilding Co.,* 188 Wash. 1, 61 Pac. 2d. 136.

The quoted provision with respect to damages in the present case is really not a provision for "liquidated damages" as that term is ordinarily understood. Usually, though not always, the courts refer to liquidated damages as a certain amount which one party is entitled to recover by contract, upon the breach of the other.

Inasmuch as the measure of damages specified in the contract we are considering, is practically identical to that stated in Section 64 of the Act, Section 71-164,

O.C.L.A., (See Appendix 19), it appears that this contract provision is, in reality, one limiting the liability of the defendant to an action for damages for breach of the contract, and precluding the plaintiff from maintaining an action for the price. In other words, by this provision, the plaintiff agreed that he would not be entitled to maintain an action for the price if the defendant breached the contract.

Provisions of this sort limiting liability and precluding one party from adopting a particular measure of damages, are valid and enforceable.

Daniels v. Morris, 65 Or. 289, 130 Pac. 397, 132 Pac. 958. The contract clause in that case provided:

> "* * * and should the buyers fail on their part to accept and pay for the hops herein agreed to be sold, the seller not being in default in the terms and conditions to be by him kept and performed, the seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the buyers, the difference between the contract price of said hops, as herein specified, and the market value of the kind and quality in this contract mentioned * * *."

The court held that the buyer was limited to the measure of recovery so specified. (See Appendix 20.)

Crandall Engineering Co. v. Winslow Marine Ry. & Shipbuilding Co., 188 Wash. 1, 61 Pac. 2d. 136. The contract provided that the seller's obligation under a warranty set forth therein was limited to replacing any part demonstrated to be defective. The contract declared that such warranty was in lieu of all other war-

ranties, express or implied. The seller, upon complaint being made by the buyer, replaced a gear in the machine sold. In denying any recovery to the buyer for breach of warranty, the court held that inasmuch as the seller complied with the obligation to replace the gear, the seller was not subject to a liability which it expressly disclaimed. The basis of the decision was that the Uniform Sales Act expressly recognizes the right of parties to contract either in compliance with or contrary to the provisions of the Act. The court stated that in the absence of fraud or other invalidating cause, it was bound to give effect to the contract between these parties. (See Appendix 21.)

Graves Ice Cream Co. v. Rudolph W. Wurlitzer Co., 267 Ky. 1, 100 S.W. 2d. 819. The Uniform Sales Act applied to this case also. The contract for the sale of a refrigerating machine provided that if the condensing unit proved to be unsatisfactory, the seller would remove it and refund to the buyer the money paid for it. The unit was unsatisfactory and the seller did remove it and refund the money. This was an action for damages for breach of an implied warranty. The contract contained the clause, "This covers all promises express or implied." The court stated that this provision negatived an implied warranty and precluded the buyer from maintaining an action for damages for breach of such a warranty.

Nostdal v. Morehart, 132 Minn. 351, 157 N.W. 584. The defendant agreed to convey certain land to the plaintiff. The contract contained a term that if the

vendor's title could not be made good, the contract would be inoperative and the vendee would be limited to a recovery of the consideration paid by him to the vendor. The latter was unable to convey a good title and the vendee brought this action against him for damages, seeking to recover the difference between the contract price and the market value, in addition to the consideration paid. The plaintiff secured a judgment in the trial court but only for the amount paid by him to the defendant, with interest. The judgment was affirmed. The court held that while the difference between the market value and the contract price is an ordinary measure of damages, the parties can fix a different measure. (See Appendix 22.)

Riggs v. Gish, 201 Ia. 148, 205 N.W. 833. This was an action on a lease in which the lessee counterclaimed for damages arising out of the failure of the lessor to tile the land as agreed. The lessor had agreed in writing to pay damages up to "one dollar and fifty cents ($1.50) to two dollars and fifty cents ($2.50) per acre" for failure to tile the property. The trial court submitted to the jury the usual measure of damages, the difference between the rental value of the property, properly tiled, and the rental value of the property in its actual condition, but limited the recovery to a maximum amount of $2.50 an acre. On appeal, this measure of damages was held to be proper. (See Appendix 23.)

The mere use of the expression "liquidated damages," in the contract we are considering, does not prevent a construction of the contract to preclude an action for

the price. Some courts, in actions involving the sale of goods, have referred to provisions of this sort as actually permitting the recovery of liquidated damages. If this provision should be so regarded, it is not invalid but is enforceable for the reason that it does not impose a penalty upon the plaintiff but appears to be a good faith attempt to authorize him to recover fair compensation.

> *Sheffield-King Milling Co. v. Domestic Science Baking Co.,* 95 Oh. St. 180, 115 N.E. 1014.

If this contract provision is regarded as one authorizing the recovery of liquidated damages, it is unimportant that the measure of damages specified is as indefinite as the corresponding statutory measure of damages.

> *Sheffield-King Milling Co. v. Domestic Science Baking Co.,* supra.
>
> *International Milling Co. v. North Platte Flour Mills,* 119 Neb. 325, 229 N.W. 22.

In both of the cases last cited, in actions brought under the Uniform Sales Act, it was held that the sellers were entitled to recover damages from the buyers in accordance with the terms of the contracts between the parties, in the face of objections by the buyers that they were liable only in accordance with the measure of damages provided in the Sales Act.

In conclusion, we respectfully contend that these authorities establish that the plaintiff cannot recover the price in this action, as he is limited to a recovery in accordance with the terms of the contract.

This means that there can be no recovery whatever by the plaintiff in this action, but it does not follow that this result imposes any undue hardship on him. It is undisputed that there was a good market for prime quality hops throughout 1947, and that the market price did not begin to fall until the latter part of November of that year. If the plaintiff's hops were of prime quality, he could have sold them readily, and without any loss whatever, after his hops were rejected by the defendant.

VII

THE COURT ERRED IN FAILING AND REFUSING TO GRANT THE DEFENDANT'S MOTION TO DISMISS ON THE GROUND STATED IN PARAGRAPH 1 THEREOF (TR. 23, 26), AND IN FAILING AND REFUSING TO SUSTAIN THE FIRST DEFENSE IN THE DEFENDANT'S ANSWER (TR. 28)

This is established by the argument under heading VI, which is incorporated herein by reference.

VIII

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE MEASURE OF THE PLAINTIFF'S RECOVERY UPON THE FACTS HERE IS, UNDER OREGON LAW, THE DIFFERENCE BETWEEN THE AMOUNT DUE UNDER SAID CONTRACT AND THE AMOUNT REALIZED FROM THE RESALE OF THE HOPS

This is established by the argument under heading VI, which is incorporated herein by reference.

IX

THE DEFENDANT IS ENTITLED TO A JUDGMENT AGAINST THE PLAINTIFF ON ITS COUNERCLAIM (TR. 30), FOR $4,000, THE AMOUNT OF THE ADVANCE, IN THE EVENT THE JUDGMENT IS REVERSED

The contract clearly contemplates that if, for any justifiable reason, the defendant does not accept and pay for any of the plaintiff's hops, the plaintiff is obligated to repay the amount of the advance, $4,000. The contract states (Tr. 11):

> ". . . . the buyer will advance and loan to the seller such sums of money as may be required by the seller to defray the necessary expenses of cultivating and picking such hops, and of harvesting and cur-

ing the same. . . . Said advances to be paid in the following manner: . . . $4,000.00 on or about September 1, 1947."

This advance was made by the defendant and has not been repaid (Tr. 98). It is acknowledged, in effect, by counsel for the plaintiff that if the judgment is reversed, a judgment should be entered in favor of the defendant and against the plaintiff on the counterclaim for $4,000 (Tr. 127, 128, 129).

Under these circumstances the defendant is entitled to such judgment in the event of a reversal.

Netter v. Edmunson, 71 Or. 604, 143 Pac. 636.

Pinnacle Packing Co. v. Herbert, 157 Or. 96, 70 Pac. 2d. 31.

Humphrey v. Sagouspe, 50 Nev. 157, 254 Pac. 1074.

CONCLUSION

The defendant respectfully prays that the judgment be reversed and that a judgment be entered on its counterclaim in favor of the defendant and against the plaintiff, for $4,000.

Respectfully submitted,

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.

APPENDIX

1. *Netter v. Edmunson,* 71 Or. 604, at 611, 143 Pac. 636, at 638:

> "An application of scientific methods may have demonstrated that the rejected hops would have made excellent beer, quite equal to those specified in the contract as first quality. Yet the defendants were under a legal obligation to deliver to plaintiffs hops of a kind and quality described in the contract. As a matter of common understanding, hops have a commercial value corresponding to the grade which they occupy, and are bought and sold on that basis. The kinds of grades and the manner of their graduation are known to all engaged in the hop industry and its allied concomitants. Therefore the contract under consideration defined the hops to be produced in terms which must be taken as the yardstick by which to measure their quality."

2. *Netter v. Edmunson,* 71 Or. 604, at 613, 143 Pac. 636, at 639:

> "The next error presented on appeal involves the refusal of the court to give certain instructions requested by plaintiffs, to the effect that if the hops were affected by a vermin damage, not of good or even color, fully matured, cleanly picked, or properly dried or cured, to the extent that defendants could not furnish 30,000 pounds, free from such defects, the hops were not of the quality described in the contract. These instructions should have been given. This litigation had its inception in the differences that existed between the contracting parties with respect to the quality of the hops. We think the description of the hops as specified in the contract was determinative of their quality."

3. *Wigan v. LaFollett,* 84 Or. 488, at 502, 165 Pac. 579, at 584:

> "Now as to the quality of these hops contracted to be delivered, the contract says that these hops, first, are not to be the product of the first year's planting, second, not to be affected by spraying or mold, third, they should be of good color, fully matured, cleanly picked, fourth, free from damage by vermin, properly dried and cured, not broken, in good order and condition; otherwise known as prime quality. You are to accept the definition of prime quality as laid down in this contract by the parties themselves. You are, however, to consider these terms as used in this contract in the ordinary meaning and acceptation of those terms. You are to give them such a reasonable construction and meaning as are placed upon them by persons who are engaged in the hop business."

4. *Lilienthal v. McCormick,* 86 Fed. 100, at 101:

> "The allegation that the defendants tendered 30,000 pounds of hops, of an average of the best product of said crops so produced, etc., and that they exerted their utmost to procure and produce crops of choice quality, and in sound condition, of good color, fully matured, etc., does not show a compliance with the requirements of the contract. The latter part of this allegation merely shows an attempt to comply with the contract, by an utmost exertion to procure a crop of hops of the quality required. The allegation that the crops tendered were an average of the best product of said crops so produced does not answer the contract, by which the defendants bound themselves to deliver hops of choice quality, and in sound condition, of good color, fully matured, etc. The tender was of an average of the best product of the crop produced, while the obligation was to deliver, absolutely, hops of choice quality, and in sound condition, good color, fully matured, etc."

5. Restatement of the Law of Contracts, Section 281:

> "In promises for an agreed exchange, a promisor is discharged from the duty of performing his promise if substantial performance of the return promise is impossible because of the non-existence, destruction or impairment of the requisite subject-matter or means of performance, provided that the promisor has not himself wrongfully caused the impossibility or has not assumed the duty that the subject-matter or means of performance shall exist unimpaired."

The following example of the application of this Section is stated under the heading "Illustrations":

> "1. A contracts to sell and B to buy 200 tons of potatoes to be grown during the ensuing season on a specific tract of land. B promises to pay half the price on July 1 of that season, and the remainder on delivery of the potatoes. The potatoes, though duly planted, are blighted before July 1. B is under no duty to make payment."

6. *Johnson v. Associated Oil Co. of California,* 170 Wash. 634, at 637, 17 Pac. 2d. 44, at 45:

> "The offer to prove that respondent breached a like contract with some one other than appellants and later adjusted its differences with that agent in a certain manner should likewise have been rejected. Such breaches and adjustments would not conclude either the appellants or the respondent as to the terms of the contracts in the case at bar."

7. *Wright v. Ramp,* 41 Or. 285, at 289, 68 Pac. 731, at 732:

> "There is no finding that the monument was of the kind called for by the contract, or that it was such a one as the defendant (the buyer) was bound to

receive and accept, and, until that question is determined in favor of the plaintiff (the seller), he is not entitled to recover as for a breach of contract."

8. *Hurley Gasoline Co. v. Johnson Oil Refining Co.*, 118 Okla. 26, at 28, 246 Pac. 438, at 439:

"The defendant (the seller) guaranteed the gasoline at point of destination to be 'water white,' and it was 'yellow,' and no obligation rested upon the plaintiff (the buyer) to accept the same. If one orders white paint, and the seller delivers yellow paint, it is true the yellow paint may cover as much surface of the house or barn, but it is not what the buyer ordered, and delivery wholly failed, and the buyer is not compelled to accept and use the yellow paint and sue for the difference between the price of the two colors of paint. The one is wholly unfit for his purpose, and he may reject it and insist on a literal compliance with the terms of the contract."

9. Section 63 of the Uniform Sales Act, Section 71-163, O.C.L.A.:

"(1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

* * * * *

"(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 71-164(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as

the buyer's and may maintain an action for the price."

10. Section 19 of the Uniform Sales Act, Section 71-119, O.C.L.A.:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

* * * * *

"Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

"(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 71-120. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents."

11. Section 20 of the Uniform Sales Act, Section 71-120, O.C.L.A.:

"(1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the

contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

"(2) * * * * * * *."

12. *Jeffries v. Pankow*, 112 Or. 439, at 458, 223 Pac. 745, 229 Pac. 903, at 908:

"It was avowedly agreed by the parties that time was the essence of the contract and that title should not pass to the buyer until any and all judgments obtained thereon were paid and satisfied in full and all conditions and stipulations in this agreement were fully performed. * * * It was competent for the parties to make such a contract. It takes the matter out of the operation of the rules for ascertaining the intention of buyer and seller relative to the passing of the title as expressed in that portion of the Uniform Sales Act codified in Section 8182, Or. L. (Section 19 of the Act, Section 71-119 O.C. L.A.)"

13. *Pulkrabek v. Bankers' Mortgage Corp.*, 115 Or. 379, at 388, 238 Pac. 347, at 350:

"Section 8182, Or. L. (Section 19 of the Act, Section 71-119, O.C.L.A.), prescribes the rules for ascertaining the intention of the parties as to the time when the property in the goods passes to the buyer, unless a different intention appears. Rules 1, 2 and 5 thereof prescribe as follows: * * * Under these statutory provisions, the intention of the parties to a contract for the sale of specific goods, such as are involved here, is controlling upon the question of when the title to the goods passes if such intention can be collected from the terms of the contract itself or

from the conduct of the parties, the usages of trade, or the facts and circumstances of the case. But, if such intention cannot be determined by those means, then the rules provided by the statute for making such determination are controlling."

14. *Weyerhaeuser Timber Co. v. First National Bank of Portland,* 150 Or. 172, at 194, 38 Pac. 2d. 48, at 55, 43 Pac. 2d. 1078:

"Plaintiffs had a right to reclaim the lumber irrespective of their right of stoppage in transitu. Where the sale is for cash and the purchase price is not paid, the title, notwithstanding delivery, does not pass from the seller, and in the absence of a waiver or estoppel the seller may reclaim the goods, either from the buyer or from a third party claiming under the buyer. The buyer having no title himself can pass none, even to an innocent purchaser for value: (citation of authorities).

* * * * *

"Delivery and payment are concurrent conditions unless otherwise agreed: Section 64-502, Oregon Code 1930 (Section 71-142, O.C.L.A.). * * * The property in goods passes when parties so intend: Section 64-402, Oregon Code 1930 (Section 71-118, O.C.L.A.).

"The appellants contend that the plaintiffs waived the payment of cash upon delivery of documents. A prior course of conduct under previous contracts will not operate as a waiver of an express stipulation in a new contract. To constitute a waiver of the condition of payment, there must be not only an act of delivery but also an intent not to insist on immediate payment as a condition of the title passing. In a cash, or cash on delivery sale, if the seller delivers but the buyer violates his promise to pay, the buyer does not acquire title: (cases cited). And after delivery the title remains in the seller until

payment unless he waives the right to treat the sale as a cash transaction: (cases cited)."

15. *Mogul Transportation Co. v. Larison,* 181 Or. 252, at 259, 181 Pac. 2d. 139, at 143:

"Assuming that a price was agreed upon, there is no dispute between the parties upon the fact that the transaction was to be a cash sale. In such a sale, payment and delivery are concurrent acts. Title to the property does not pass until payment, and, if the buyer has taken possession without paying the price, the seller, unless he has waived concurrent payment, may reclaim the property if, in the interim, rights of innocent third persons have not intervened."

16. Section 76(4) of the Uniform Sales Act, Section 71-176(4), O.C.L.A.:

"(4) Goods are in a 'deliverable state' within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them."

17. Section 47 of the Uniform Sales Act, Section 71-147, O.C.L.A.:

"(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

"(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

"(3) * * * * * * *."

18. *Struthers-Ziegler Cooperage Co. v. Farmers Mfg. Co.,* 233 Mich. 298, at 302, 206 N.W. 331, at 332:

"But delivery and the passing of title at the point of shipment does not preclude the buyer from inspecting and rejecting at the point of destination, if the goods when delivered are not such as are stipulated in the contract. It has uniformily been held that under such circumstances as between the seller and the buyer the title which passes is a conditional title, subject to the right of inspection and rejection at the point of destination."

19. Section 64 of the Uniform Sales Act, Section 71-164, O.C.L.A.:

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

20. *Daniels v. Morris,* 65 Or. 289, at 297, 130 Pac. 397, at 399, 132 Pac. 958:

"It is contended by the defendant that the plaintiffs' refusal to take the hops was an abandonment of the contract, and therefore a forfeiture of the advances made; but the damages for breach of the

contract by plaintiffs is fixed by the contract, namely: 'The seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the buyers, the difference between the contract price of said hops as herein specified, and the market value * * * on the 31st day of October, 1910.' This, we think, is intended to cover all forfeitures and damages, and that defendants must account for the advances received by them and offset the same against the damages in the contract provided for."

21. *Crandall Engineering Co. v. Winslow Marine Ry. & Shipbuilding Co.,* 188 Wash. 1, at 17, 61 Pac. 2d. 136, at 143:

"It will thus be seen that, while the Uniform Sales Act provides the remedy or relief for breach of warranty, it also specifically provides that the parties may contract with reference thereto.

"In this case, the contract as finally made by the parties expressly provided that appellant's obligation under the warranty was limited to replacing any part demonstrated to have been defective, that such warranty was in lieu of all other warranties, express or implied, and that no other liability in connection with the goods was assumed by the appellant.

"The uniform sales act expressly recognizes the right of parties to contract either in compliance with, or else contrary to, the provisions of the act, and, in the absence of fraud or other invalidating cause, gives effect to such contract. The parties, having made the contract, are bound by it. The appellant, having complied with the obligation assumed by it, is not subject to a liability which it has expressly disclaimed."

22. *Nostdal v. Morehart,* 132 Minn. 351, at 352, 157 N.W. 584, at 585:

"This provision, standing alone, is clear and unequivocal. * * * It means that if the title which the vendor can convey to the purchaser is not good, and cannot in the exercise of good faith on the part of the vendor be made good, then the agreement is to be at an end as to both parties, and the purchase money paid is to be refunded. This remedy so fixed by the contract is exclusive of all others. It is binding on both parties and either party has a legal right to invoke it."

23. *Riggs v. Gish,* 201 Ia. 148, at 155, 205 N.W. 833, at 836:

"The measure of damages adopted by the court made it possible for the jury to give substantial effect to the intentions of the parties as therein expressed. * * * There is no reason why the parties, if they desired to do so, might not agree upon a basis for settling damages. As the amount was not specifically agreed upon, the damages were not liquidated, but a maximum recovery was fixed. The court gave practical effect to the agreement."

No. 12440

United States
Court of Appeals
For the Ninth Circuit

HUGO V. LOEWI, INC., a corporation,
Appellant,
vs.
FRED GESCHWILL,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court for the District of Oregon.

ROY F. SHIELDS,
RANDALL B. KESTER,
WILLIAM E. DOUGHERTY,
Attorneys for Appellee.

HOUGHTON-CARSON COMPANY, PRINTERS, PORTLAND OREGON

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STATUTES AND RULES

(Italics indicate the pages on which statutes or rules are quoted)

OTHER AUTHORITIES

Who's Who in the Record[1]

Name of Witness	*Called by*	*Record*
Aman, Wilbert Hop grower.	Pltf.	S.R. 187-194
Becker, Caspar Hop inspector for Ralph Williams, an Oregon hop dealer.	Pltf.	G.R. 285-290
Bullis, D. E. Chemist and hop-analyst, Experiment Station, Oregon State College.	Pltf.	S.R. 326-343
Byers, James A. Employee of C. W. Paulus, local representative of appellant Hugo V. Loewi, Inc.	Deft.	S.R. 219-228
Cornoyer, H. A. Oregon hop dealer.	Pltf.	S.R. 177-187
Davis, Gilbert Field man for A. J. Ray & Son, Inc., local representative of appellant John I. Haas, Inc.	Deft.	W.R. 346-369
Eismann, Howard Local representative of S. S. Steiner, Inc., which, in addition to Loewi and Haas, is the other of the three large hop buyers in the country.	Deft. Deft.	S.R. 284-290 W.R. 372-388

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1 While the number of experts that could be called was limited (G.R. 216, 289; S.R. 178-180), even so the consolidated record contains the testimony of 34 different witnesses, some of whom testified more than once. This table has been included to facilitate consideration of the testimony by identifying the various witnesses and giving the record references to their testimony.

The abbreviations used to designate the printed portions of the consolidated record are based upon the initial of the name of the respective appellee:

G.R.—Record printed in Hugo v. Loewi, Inc. v. Geschwill, No. 12440.

S.R.—Record printed in Hugo v. Loewi, Inc. v. Smith, No. 12441.

W.R.—Record printed in John I. Haas, Inc. v. Wellman, No. 12442.

Who's Who in the Record—Continued

Name of Witness	*Called by*	*Record*
Faulhaber, Joseph Chief of Police of Mount Angel, Oregon, and formerly a hop grower.	Pltf.	G.R. 200-206
Fournier, James H. Manager of Mt. Angel Branch, United States National Bank of Portland.	Pltf.	G.R. 191-200
Franklin, H. F. Nut grower and former hop inspector.	Deft.	G.R. 409-412 492-496
	Deft.	W.R. 393-395
Fry, Lamont Field man and inspector for C. W. Paulus, local representative of appellant Hugo V. Loewi, Inc.	Deft.	G.R. 291-318
	Deft.	S.R. 191-219
Geschwill, Fred Hop grower, plaintiff-appellee in Hugo V. Loewi, Inc. v. Geschwill.	Pltf.	G.R. 70-193 496-501
Glatt, Ray J. Hop grower.	Pltf.	W.R. 120-129 421-428
Haas, Frederick J. Vice-President of appellant John I. Haas, Inc.	Deft.	W.R. 441-470
Hoerner, G. R. Plant bacteriologist employed by Extension Service, Oregon State College and U. S. Department of Agriculture.	Deft.	G.R. 365-370 375-387 503
	Deft.	S.R. 266-272
Keber, Joseph J. Retired banker and hop grower.	Pltf.	W.R. 129-150
Matheson, Catherine Stenographer in Hillsboro office of A. J. Ray & Son, local representative of appellant John I. Haas, Inc.	Deft.	W.R. 271-275
Netter, Ernest Hop inspector for Ralph Williams, an Oregon hop dealer.	Deft.	G.R. 319-322

Who's Who in the Record—Continued

Name of Witness	*Called by*	*Record*
Noakes, C. F. Vice-President, Director and Manager of Salem office of A. J. Ray & Son, local representative of appellant John I. Haas, Inc.	Deft.	W.R. 276-341
Oppenheim, Robert President of appellant Hugo V. Loewi, Inc.	Deft. Deft.	G.R. 421-477 S.R. 290-324
Paulus, C. W. Local representative of appellant Hugo V. Loewi, Inc.	Deft. Deft.	G.R. 322-364 371-374 S.R. 228-266 274-277
Ray, Harold W. President of A. J. Ray & Son, a corporation, local representative of appellant John I. Haas, Inc.	Deft. Deft. Deft.	G.R. 391-409 481-492 S.R. 272-274 277-284 W.R. 163-257 417-418 435-438
Schlottman, O. J. Hop grower.	Pltf.	W.R. 157-162
Schwind, Edward Brewmaster, at time in question with Lucky Lager Brewery, Vancouver, Washington.	Pltf.	G.R. 206-216
Smith, Kilian W. Hop grower, plaintiff-appellee in Hugo V. Loewi, Inc. v. Smith.	Pltf. Pltf.	S.R. 94-177 325-326 W.R. 429-435
Sprauer, Karl Foreman of Mt. Angel College farm, in charge of College hop yard and hop-picking machine.	Pltf.	G.R. 217-241
Townsend, Emma L. Secretary and Office Manager of A. J. Ray & Son, local representative of appellant John I. Haas, Inc.	Deft.	W.R. 257-271

Who's Who in the Record—Continued

Name of Witness	*Called by*	*Record*
Troxel, Ronald Hop inspector for A. J. Ray & Son, local representative of appellant John I. Haas, Inc.	Deft.	W.R. 389-392
Walker, R. M. Hop grower.	Plf.	G.R. 241-285
Weathers, Earl Hop inspector for C. W. Paulus, local representative of appellant Hugo V. Loewi, Inc.	Deft.	G.R. 387-391
Wellman, O. L. Hop grower, plaintiff-appellee in John I. Haas, Inc. v. Wellman.	Plf.	W.R. 57-120 396-416
Whitlock, Bert W. In charge of hop leaf-and-stem and seed analysis work on the Pacific Coast for U. S. Department of Agriculture.	Deft. Deft.	G.R. 478-480 W.R. 341-346
Willig, E. F. Manager of Oregon Hop Producers Co-operative.	Plf.	W.R. 150-157
Williams, Ralph E., Jr. Oregon hop dealer.	Deft. Deft.	G.R. 412-420 W.R. 370-372

No. 12440

United States
Court of Appeals
For the Ninth Circuit

HUGO V. LOEWI, INC., a corporation,
Appellant,
vs.
FRED GESCHWILL,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE CASE

This is an action to recover the balance due on the purchase price of hops which defendant-appellant bought under contract from plaintiff-appellee.

The action was commenced in the State Court, and was removed to the Federal Court by appellant on the ground of diversity (G.R. 17-23). Both parties waived jury trial, and all issues were tried by the Court. The Court thereafter entered judgment for plaintiff-appellee, based upon findings of fact and conclusions of law (G.R. 34-44).

Consolidation of Records

On trial it appeared that this action involved common questions of law and fact with two other cases then pending before the Court (and now also on appeal to this Court *sub nom.* Hugo v. Loewi, Inc., Appellant, v. Smith, Appellee, No. 12441, and John I. Haas, Inc., Appellant, v. Wellman, Appellee, No. 12442). Accordingly the parties consented and the District Court ordered that the three actions be tried jointly and that the evidence in any of the actions should be deemed to have been taken and should be considered in each of the others to the extent that such evidence was pertinent, material and relevant (G.R. 34-35, 504; S.R. 47-48, 179; W.R. 9, 409-410).[2]

This Court has entered orders in the three cases:

(a) Permitting the documentary exhibits to be considered in their original form without printing or otherwise reproducing them (G.R. 512-513; S.R. 346-347; W.R. 477-478).

(b) Consolidating, for the purposes of the appeal, the record in each case with the records in the other two cases, to the extent that the evidence, exhibits and proceedings contained in the records on appeal in all three cases may be

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2 In order to avoid unwieldy references, the following abbreviations are used to refer to the various parts of the consolidated record:

G. R.—"Geschwill Record," meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Geschwill, No. 12440.

S. R.—"Smith Record," meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Smith, No. 12441.

W. R.—"Wellman Record," meaning that portion of the consolidated record printed in the case of John I. Haas, Inc. v. Wellman, No. 12442.

considered as a part of the record in each case, and without duplication of printing (G.R. 515-518; S.R. 354-357; W.R. 480-484).

(c) Permitting cross-references to be made among the briefs in the three cases.

Specifications of Asserted Error

Of the 42 points on which appellant first intended to rely on appeal in this case (G.R. 49-58), 17 were abandoned and appellant's brief contains only 25 specifications of asserted error.[3] Of Appellant's 25 specifications of asserted error (Br. 10-18), the first 17 relate to the findings of fact, six relate to the conclusions of law, and two relate to other legal points.

Since there are many assertions of error directed to the findings of the District Court, the findings are set out in their entirety in the Appendix to this brief with citations to the record on each contested point, for the purpose of showing in an orderly form that the findings are supported by the evidence.[4]

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3 The points (G.R. 49-58) on which appellant no longer relies, and which have not been made specifications, are Nos. 4, 5, 6, 10, 11, 15, 31 and 33-42.

4 Appellant's brief (pp. 3, 32, 36, 60) states that the trial Court adopted in large part a draft of findings submitted by counsel. In fact, the trial Court heard oral arguments; considered extensive briefs on the facts and the law; handed down his memorandum of decision; considered drafts of findings submitted by both parties, together with appellant's objections to appellee's draft; heard oral arguments thereon; and subsequently entered findings and conclusions drafted by appellee, with one change. (See docket entries: G.R. 66-67; S.R. 84-85; W.R. 49-50.) By that change the Court improved the findings by striking out some repetitious matter at the end of paragraph 11 (G.R. 39), and substituting in lieu thereof the ultimate finding: "Said hops when tendered were merchantable." As this Court held in an earlier hop case, *Wolf v. Edmunson,* 240 Fed. 53, 59, that was the final question of fact for determination on the quality issue.

The Issues

Though appellant has specified 25 grounds of asserted error (Br. 10-18), and has nine subdivisions to its argument(Br. 18-20), the "ultimate" issues proposed by appellant (Br. 4) are two: One relates to the commercial quality of the hops; the other, to appellee's form of relief and measure of recovery. On these two basic issues our position is, succinctly, as follows:

(1) *Quality.* (a) The trial Court found that the hops substantially conformed to the quality provisions of the contract (G.R. 40). This finding is amply supported by the evidence (Appendix A, post, pp. vi-viii, xv-xx).

(b) Even if that were not enough, appellant would be precluded, upon other grounds, from urging a defense of alleged poor quality. Thus, as the trial Court found (G.R. 33, 36-37, 39), and as the evidence shows (Appendix A, post, iv-vi, x, xviii), the only claimed defect in the hops was the touch of mildew which appellant knew about when it contracted for the purchase and made the advance payment, and appellant did not in fact rely upon any representation or warranty that the hops would be any different than they were.

(2) *Form of relief.* On this issue appellant has a number of purely technical arguments. In essence, appellant contends that appellee should not be allowed to bring an action on the contract for the price, but should be relegated to an action for breach of the contract. The result of appellant's

theory as applied to this case would be that, even though appellant wrongfully refused to pay for its purchase, the appellee's measure of recovery would be zero. The trial Court concluded (G.R. 42) that under Oregon law the measure of appellee's recovery upon the facts was the balance of the contract price, after deducting the advance payment and the proceeds on resale.

Narrative Statement

All of the determinative facts appear in the Court's findings (G.R. 35-41, and Appendix A, post, pp. i et seq.), and we shall not here reiterate them. Instead, we shall fill in some of the background of the controversy which we believe to be inadequately or incorrectly described in appellant's statement of the case (Br. 3-10).

Practically all of the hops produced in the United States come from the Pacific Coast. Approximately 30% of the Coast production comes from Oregon, where the main source of supply is from the hop yards in the Willamette Valley. The chief use for hops is in producing beer.[5] A fraction of one per cent of the production is used in the drug and chemical trade. (G.R. 251, 446, 448-449.)

Hops are judged primarily on the basis of flavor, sometimes called aroma.[6] The flavor is given by the oils and resins in the hops, principally in the

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5 Mr. Schwind, the only brewmaster who appeared as a witness, testified that the hops here in controversy were good hops, such as he would have used in his brewery (G.R. 209-210, 214).

6 The hops in controversy had a good flavor (G.R. 212, 489).

lupulin.[7] (G.R. 82-83, 212, 248-249, 260, 458-459, 489; S.R. 330.)

Aside from hops controlled by grower-dealers, or by co-operatives, the usual course of trade is for the farmers to sell their hops to hop dealers who in turn resell to the brewers. The number of dealers to whom growers can sell has become limited in recent years. The three largest dealers are considered to be S. S. Steiner, Inc., appellant John I Haas, Inc., and appellant Hugo V. Loewi, Inc. (G.R. 252, 422, 447, 452, 475; S.R. 288; W.R. 383, 460.)

Nearly all of the hops so purchased by dealers from farmers are bought under a distinctive type of agreement, illustrated by the contracts involved in these cases. In many respects such contracts are *sui generis.* They have been found by the Oregon Court to create a relationship similar to a joint venture. The farmer provides the hop yard and his labor; the dealer advances money for the purpose of raising and harvesting the crop; and the farmer is bound to deliver the specific hops produced under the joint enterprise to the named dealer. Such a contract is not a mere option on the part of the purchaser, as appellant seems to assume, but is mutually obligatory. (G.R. 7-16, 452; S.R. 10-18; W. Ex. 1-A; *Livesley v. Johnston,* 45 Or. 30, 51-52, 76 Pac. 946, 951, 65 L.R.A. 783, 106 Am. St. Rep. 647; *Livesley v. Heise,* 45 Or. 148, 154, 76 Pac. 952,

7 Lupulin: "[I]t is the yellow grain which you find inside." (G.R. 459.) "The resinous yellow powder found under the scales of the calyx of the hop." (Shorter Oxford English Dict.)

953; *Wigan v. La Follett,* 84 Or. 488, 497, 165 Pac. 579, 582.)

Hops are subject to certain vicissitudes. In some years there may be "mold," caused by aphis accumulating in the hops and giving them a dark color. In 1946 and 1948 the Yakima yards produced quite a few "red" hops caused by "wind-whip" (i.e., the arms of the vines sway in the wind, hit each other, and bruise the hops). In 1947 the Willamette Valley yards showed "red" hops caused by "mildew." Such mildew is brought on by rainy weather, and, depending on how late in the growing stage it develops, may stunt the vine so that no hops are produced; or it may stunt the cones so that they are just small nubbins, which like leaves and stems are extraneous matter in the baled hops; or it may merely color parts of the petals without affecting the lupulin. (G.R. 79-81, 145, 281, 369, 461; W.R. 92, 340, 469.)

In the first part of the 1947 hop-growing season it looked as if there would be a full crop of Oregon hops, and the dealers offered farmers contract prices of around 45 cents a pound. In the summer, however, the weather brought on unusual mildew in the Willamette Valley yards. The prospect was for a short crop, which always means high prices. The dealers then became anxious to buy more Oregon hops.[8] They rapidly increased the price offered to growers, and by September the growers' market

8 The Oregon purchases at that time were not competitive with Washington and California hops because the crops in those states were almost completely contracted (S.R. 310).

price had reached 85 cents a pound, with the following premiums and discounts:

> 5 cents a pound premium for fuggle hops, which mature earlier and are more resistant to mildew than cluster hops.
>
> 10 cents a pound premium for "seedless" hops (less than 3% seeds), or 5 cents a pound for "semi-seedless" hops (less than 6% seeds).
>
> 1 cent a pound premium for each 1% of leaf and stem content less than 8%.
>
> 1 cent a pound discount for each 1% of leaf and stem content greater than 8%.

(G.R. 94-95, 244-247, 343-344, 363, 369; G. Exs. 1, 29; S.R. 190-193, 240, 310-311; W.R. 255-256, 316-317, 340-341.)

Mr. Oppenheim, president of appellant, made an inspection trip out to Oregon in August, 1947. It is customary for hop dealers to examine the yards closely. Mr. Oppenheim made a comprehensive survey of the hop-producing section of the Willamette Valley. He was out here, he said, "when the downy mildew infestation was at its height." He found wide-spread mildew, "apparent to anybody with eyesight." He noted the prospects for a short crop and decided to buy more hops. (G.R. 189, 313, 426-427, 449, 453; S.R. 208, 245, 310-312; W.R. 340.)

Mr. Oppenheim was interested more in buying fuggles than clusters. About August 12, 1947, he and Mr. Paulus, appellant's local representative, watched Mr. Geschwill's fuggle crop being picked by machine at St. Benedict's Abbey (Mt. Angel College). At that time Mr. Paulus spoke to Mr. Geschwill about buy-

ing his fuggles. Mr. Geschwill was not interested in selling only the fuggles apart from the clusters. Subsequently Mr. Oppenheim authorized the purchase of both fuggles and clusters. The purchase of Mr. Geschwill's hops on that basis was negotiated for appellant by Mr. Fry. (G.R. 88-96, 323, 342, 450; S.R. 310-311.)

Mr. Fry was a field man and hop inspector from appellant's local office. Having been authorized to buy Mr. Geschwill's fuggles and clusters, Mr. Fry, on August 17, 1947, went out to see Mr. Geschwill at his hopyard. At that time Mr. Fry saw the cluster hops on the vine. The touch of mildew was then visible upon looking at the hops on the vine. Not finding Mr. Geschwill at the yard, Mr. Fry followed him into Mt. Angel, bargained with him for several hours, out-bid another buyer, had Mr. Paulus talk to Mr. Geschwill on the telephone, and then, to be sure the deal was closed, went to Mr. Geschwill's home that night to sign him up on the sales slip. The agreement was for a floor price of 85 cents, or the market price on a date selected by the grower, with the usual premiums and discounts. (G.R. 90-96, 152, 291-292, 312-313, 343.)

The following day, August 18th, Mr. Byers, another field man working under Mr. Paulus, went out to Mr. Geschwill's hop yard with the two contracts for him to sign, and paid him the $3,200 advance payment on the fuggles. Contrary to the usual practice, appellant had divided the transaction into

two papers, one for the fuggle hops and the other for the cluster hops. After Mr. Geschwill had signed them, Mr. Byers took the two contracts back to be signed by Mr. Oppenheim. Copies were returned to Mr. Geschwill by letter of August 27, 1947, together with an advance payment of $4,000 on the cluster hops. The cluster hops were picked within a few days, and duly cured,[9] baled and delivered in warehouse for the buyer in Mt. Angel.[10] (G.R. 97, 152-153, 341; G. Exs. 1, 2, 8, 29; S.R. 262; Appendix A, post, vi-ix.)

By September 17th Mr. Paulus' office in Oregon had forwarded to appellant in New York:

> Two "type" samples of the cluster hops—one by air express, the other by ordinary express (G. Exs. 11, 12).
>
> Advice that Mr. Geschwill had selected the going market price (G. Exs. 7, 9, 18).
>
> Results of the Government inspection—8% leaves and stems and 1% seeds (G. Exs. 5, 18, 40).

Appellant by telegram of September 18th to Mr. Paulus said concerning the Geschwill cluster hops (G. Ex. 20):

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9 Mr. Fry examined some of the hops after the drying and complimented Mr. Geschwill on the fine job he was doing (G.R. 159-161, 293).

10 Half of the fuggles and clusters were cured and baled by Mr. Geschwill and the other half by Mt. Angel College. Mr. Fry on trial, and counsel on brief, have asserted that the bales were "false-packed." This is a newly-coined term which, despite its bad sound seems to mean merely that, after appellant had decided to reject the cluster hops, Mr. Fry thought they did not run quite uniform. Mr. Paulus found that the alleged variation, which in any event must have been slight, was immaterial. Mr. Becker, an independent hop inspector, found that the bales did run uniform. (G.R.98-99, 119, 165, 183, 201-203, 223, 287-288, 336, 356, 360, 496-501.)

"These hops fair quality but not prime delivery. At what price can you settle with grower?"

Thereafter three more type samples were sent appellant in New York (G.R. 352-353; G. Ex. 13), and Mr. Paulus advised appellant that Mr. Geschwill still wanted the going market price (G.R. 457). Appellant then, on September 25th,[11] telegraphed Mr. Paulus (G. Ex. 48):

"Three samples Lot 79 Geschwill quality poor full of stems and blighted hops. Positively reject these hops. Don't settle with Geschwill on fuggles unless he returns advances on clusters. We instructed you not to take in any fuggle hops where clusters are involved until satisfactory settlements made. * * *"

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11 September 25th is the date upon which the other appellant, John I. Haas, Inc., also suddenly reversed its position (W. Ex. 5).

About that time it became known that the crop was not as short as the dealers had expected; and suggestions were then being made about Government grain restrictions which might reduce brewers' demand.

The U. S. Department of Agriculture Semi-Monthly "Hop Market Review" for September 29, 1947 (G. Ex. 33) has the following comments:

"This [favorable weather conditions] will tend to increase the Oregon crop somewhat above the trade estimate of around 60,000 bales shown in our report of September 15, but until all the hops are baled, the total production cannot be determined." (Actual Oregon 1947 production was over 80,000 bales, G.R. 245-247, 265, 453.)

"Suggestions that some restrictions be placed on the quantity of grains to be used during the year in the manufacture of liquors may have also been a factor in slowing down trading and movement of hops." (And see S.R. 323; W. Ex. 3-U.)

Concerning the timeliness of the "Hop Market Review," Mr. Walker testified (G.R. 255): "It is usually a little behind the market. If the market is either advancing or declining rapidly, they are probably fifteen days behind, but it probably took them that long to gather the news from the three states which they compile for the publication."

The conditions reported in the "Hop Market Review" for September 29th were undoubtedly known among the large dealers as early as September 25th, and especially the production under their own contracts.

At that time appellant had the official inspection report on the whole crop showing only 8% leaves and stems. Mr. Oppenheim had personal knowledge of the wide-spread mildew that year, and naturally the mildew which was general in the yards showed in the baled hops. Mr. Geschwill had a good crop,[12] and was able to have the hops picked by machine which operated to throw out mildewed hops. Mr. Oppenheim admitted that he found mildew in at least two or three out of every four samples of that year's Oregon crop, some "decidedly" worse than in the Geschwill hops. (G.R. 77-78, 142-143, 221, 238-239, 283, 414-415; G. Exs. 5, 40; W.R. 318, 465.)

Mr. Oppenheim admitted that the Geschwill fuggles definitely complied with the contract (G.R. 440). On September 24th Mr. Paulus had caused the fuggles to be inspected and weighed in and, as was customary, to be promptly paid for (G. Exs. 10-A, B, C). Mr. Oppenheim was wroth with Mr. Paulus for having so complied with the contract, as stated in appellant's letter of September 25th to Mr. Paulus

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12 There is ample evidence supporting the trial Court's finding: "Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said agreement." (Appendix, post, xvii, and vii, xv-xx.)

Appellant's only specific objection to the hops was the touch of mildew which, one of the buyer's expert witnesses admitted, did not affect the actual quality of the hops. (G.R. 481; and Appendix, post, x, xiv-xv.)

As a general practice hops with a touch of mildew such as these, and covered by a contract such as this, were in fact accepted by the hop dealers. (Appendix, post, xviii-xix.)

Appellant's brief (pp. 28-29) stresses the testimony of Mr. Hoerner who, at appellant's direction, made an unprecedented experiment with two minute samples of hops for the purpose of testifying. The experiment was not designed to, and did not, show the true extent of the mildew. (Appendix, post, xi-xii.)

(G. Ex. 27, and see G. Ex. 30):

> "Furthermore, we recently instructed you not to make any settlements with Growers who had combination Fuggles and Clusters, until we had both lots straightened out. Nevertheless, you wire us this morning that you took in the Geschwill Fuggles. We are perfectly satisfied to take this delivery, provided it does not jeopardize our standing on the Clusters, but as the contracts were made at one and the same time and work together, regardless of their being on separate pieces of paper, we want to handle the two lots as one. We therefore instructed you not to settle with Geschwill on the Fuggles until you have straightened out the Clusters unless he is willing to use the Cluster advances on the Fuggle delivery. We await your further report on this lot. * * *"

Of course, this interchange of correspondence between appellant and its local representative was unknown to Mr. Geschwill at that time. Appellant did not then notify Mr. Geschwill that it had decided to "positively reject" the clusters. Appellant had purported to base its decision on only a few samples in its New York office, and no inspection had been made of the full crop in the warehouse in Oregon. As Mr. Oppenheim explained on trial (S.R. 315):

> "* * * until they are actually examined bale for bale I would not consider a type sample as representative of the entire lot. That would be a very unfair position to take."

Mr. Haas, vice-president of the other appellant, also said (W.R. 462):

> "* * * you cannot inspect a lot by simply having one or two type samples * * *"

Accordingly, appellant decided to go through the "form" of a full inspection. As Mr. Oppenheim testified (G.R. 463-464):

> "Q. Did I understand you to say you did not think a lot of hops should be accepted or rejected until after a complete inspection had been made?
>
> A. That is simply the procedure of the trade. I believe we are required to inspect hops. We cannot just reject them and say, 'I won't take these hops.' We have got to go through the form, necessarily, the form of looking at the hops. We have to inspect the hops and know they are the hops tendered to us. I think that is a requirement or custom of the trade."

If the inspection was to be just a form, however, there was a problem about weighing the hops. The custom is that, when hops are inspected in the warehouse, the buyer's representative sets aside, and does not weigh in, any bales which are rejected. The weighing in of hops is considered in the trade as an acceptance of them.[13] As appellant advised Mr. Paulus on October 3rd (G. Ex. 47):

> "We confirm our wire to you today, referring to your letter of September 29th wherein you mention that when inspecting the various

13 G.R. 116; W.R. 83, 126, 134, 137-138, 140-143, 194-195, 233; 325-328, 388, 411-414, 417-418, 421-438.

> lots which we have notified you are not prime, you were going to weigh these up if you could get some kind of an agreement with the Grower that it was o.k. to do so. However, we feel that until we have come to a final decision on these lots, they should not be weighed as weighing them would imply that we were considering accepting these hops at some price. We stated in our wire that we positively refuse to make any commitments of this kind."

Pursuant to his instructions (G. Exs. 17, 47), Mr. Paulus advised Mr. Geschwill on October 3rd (G. Ex. 4) that appellant thought the preliminary cluster samples to be below standard, and that his office had been instructed to "fully inspect" the hops and submit 10th bale samples to appellant's New York office for their final decision. Then appellant's local office prepared a form for Mr. Geschwill to sign (G. Ex. 32) reciting that the inspection and weighing would not be considered an acceptance. Mr. Fry had Mr. Geschwill sign the statement, as Mr. Geschwill testified (G.R. 163):

> "* * * he said it would be more convenient for him if they were weighed; all he has to do is write the weight down and I get my money, by doing it this way, and I said, 'If that is your way of doing it, it is all right with me.' "

On October 10th Mr. Fry went through the inspection for appellant.[14] The bales were already

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14 Mr. Fournier, the local bank manager, and Mr. Geschwill testified that during the inspection Mr. Fry made a complimentary remark to them, to the effect that the lot was one of the best he had taken in that year. (G.R. 110, 161, 195.) Mr. Fry denied this (G.R. 307-308).

stamped with the warehouse number and the Government inspection number. Mr. Fry lined up the bales, took tryings out of each bale, drew 10th bale samples, examined the tryings and samples, numbered each bale on the head, weighed the bales, and prepared the weight slips. (G.R. 109-111, 163, 315-317; G. Exs. 6-A, 6-B; Appendix, post, vi-vii, viii, x.)

No one with any authority to exercise any judgment as to either acceptance or rejection ever inspected the full crop. At the time the inspection was made appellant's local representatives had been instructed to reject the hops. (G.R. 464, 316-317, 351-352.)

After the 10th bale samples were received in New York appellant telegraphed Mr. Paulus (G. Ex. 26):

> "Received thirteen samples Lot 79 Geschwill crop. All samples show many blighted hops but samples of bales 70, 100 and 130 decidedly better than other samples. Willing accept any bales reasonably free of blighted hops and equal to these three samples. Reject balance account not being prime delivery."

Thereupon Mr. Paulus, Mr. Geschwill and Mr. Faulhaber examined the samples together, and they could not see any difference in those three bales as compared with the others.[15] Mr. Paulus found that all the samples showed the same general characteristics throughout. He found that while some part of the three samples might show a little more bright-

15 Subsequently when the entire lot was examined for the purpose of the resale the hop inspector, Mr. Becker, found that the bales ran uniform to type sample (G.R. 287).

ness, the slight difference was not material. Mr. Geschwill thought that if those three were acceptable all of them were. (G.R. 118-119, 183, 201-203, 336, 360.)

Appellant did not choose to take all the hops that actually ran like those samples. Evidently appellant had in mind just taking enough to cover its advance, since Mr. Paulus had previously deviated from his instructions by paying for the fuggle hops in accordance with the contract without deducting the cluster advances (G. Ex. 27; G.R. 465). Accordingly on October 30th a letter of formal rejection of the whole crop was mailed to Mr. Geschwill (G. Ex. 3). On October 31st appellant recorded the contract as a chattel mortgage (G.R. 122; Appendix, post, vi.)

Appellant declined to come to any settlement with Mr. Geschwill (G. Exs. 41-45). Appellant declined to release the chattel mortgage unless Mr. Geschwill first paid $4,000.[16] (G.R. 468.) Resale of the hops with the chattel mortgage outstanding, and without the consent of appellant, was prohibited and probably would have constituted larceny by mortgagor (G.R. 122-124; §23-524, O.C.L.A.). The market

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16 Mr. Geschwill had expended far more money in the joint venture than appellant had (G.R. 73, 192).

was very limited.[17] Dealers ordinarily will not consider a lot of hops which are under contract to, or which have been rejected by, another dealer (G.R. 122-126, 188, 249-251, 461, 489; W.R. 134).

After having contracted with Mr. Geschwill to buy both fuggles and clusters, appellant took the fuggles, attempted to reject the clusters, and this lawsuit developed. After the action was commenced appellant on stipulation permitted resale of the clusters to Williams & Hart, the local firm of dealers whom appellant had originally out-bid to buy the hops. (G.R. 93-95, 122-130, 168-169; G. Exs. 27, 28; S.R. 310-311; Appendix, post, ii, xx-xxiii.)

Summary of Argument

Appellee's argument is directed to the two "ultimate issues" posed by appellant (Br. 4):

I. *Issue on quality of hops.* The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract, and that the appellee fully performed the contract. The findings are clearly supported by the evidence. (This is in answer to appellant's points I, II and III, Br. pp. 18-19, 20-46.)

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17 At first it was not a case of the *quoted* price declining so much as it was a case of very few purchases being made; later the market went down to 20 cents a pound. (Appendix, post, xxii-xxiii.)

As Mr. Walker explained on trial (G.R. 247):

"Of course, they [the dealers] wanted to retain that market, that level of the market, for the simple reason that most of the growers had open-end contracts at a selected date, at a high price for delivery, and the brokers, in turn, had made sales to breweries at the prices we had during that scare [i.e., short crop]. They naturally wanted to maintain that level, so the market stayed pretty high up until towards the close of the year, away up to the end of November, and then it leveled away and commenced going down; of course, as we know, it went down in 1948."

II. *Issue on form of action.* The trial Court concluded that upon the facts of this case, where the seller fully performed and made a valid tender of the goods, the seller can recover the balance due on the contract in this form of action. The trial Court's conclusion is clearly supported in law. (This is in answer to appellant's points IV, V, VI, VII, VIII and IX, Br. pp. 19-20, 46-71.)

I. ISSUE ON QUALITY OF THE HOPS

The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The finding is clearly supported by the evidence.

As to whether or not appellee complied with the contract, appellant's only contention is that appellee did not tender hops of contractual quality.

Appellant's only objection to the quality of the hops relates to the mildew (Appendix, post, vii-viii, x, xi). As Mr. Oppenheim, appellant's president, said (G.R. 438):

> "* * * if they had been entirely free of blight [i.e. mildew], they would—I would have said they would have been a good, prime hop; they were not as badly blighted or as red as some other hops which I had seen other samples of, Oregon hops."

The trial Court found that upon the facts the claimed defect was not material (Appendix, post x). Appellant argues that the claimed defect was substantial and that the hops therefor did not conform to the quality provisions of the contract.

The Court found: "Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said agreement." (G.R. 40; and see Appendix, post, vi-viii, x, xv-xx.)

There is substantial evidence in the testimony of qualified witnesses to support that finding. (E.g., Mr. Geschwill, G.R. 134-135, 173 et seq.; Mr. Sprauer, G.R. 223-224; Mr. Faulhaber, G.R. 202.)

While the judgment is also justified on other grounds, we submit that the quoted finding and supporting evidence are alone sufficient to sustain the trial Court's determination on this factual issue.

Appellant's contentions. Leaving aside for the moment the question of whether or not appellant can now assert the warranty, not having relied upon it, both parties agree that the contract provided for "prime quality" hops. As we have seen, there is substantial evidence that these hops were of that quality. Appellant seems to contend, however, that the testimony of the hop men who so testified should be rejected, for two reasons: (a) It is opposed by some of the testimony of appellant's witnesses; and, (b) it is said to be contrary to counsel's interpretation of some of the phrases used in the contract.

Conflicting evidence and credibility of witnesses. Appellant's first contention involves the determination of the factual issue on conflicting testimony, and an inquiry as to the credibility of witnesses. In effect appellant asks this Court to re-try the case

on the voluminous paper record. In this connection we rely upon the trial Court's findings and the evidence which clearly supports them (Appendix, post, particularly vi-viii, x, xx); Rule 52(a), Federal Rules of Civil Procedure,[17a] and the Oregon law developed in similar hop cases, such as *Seidenberg v. Tautfest,* 155 Or. 420, 426, 64 P. 2d 534, 536, where it is said:

> "The reason plaintiff [hop buyer] really asserts for the rejection of the hops is that they do not conform to the quality specified in the contracts. This question presented an issue of fact. It would require many pages of the reports to set forth the testimony of the various hop experts relative to this phase of the case. The record discloses that judging the quality of hops is not an exact science. Some of the experts on behalf of plaintiff [hop buyer] testified that a certain sample of hops was of 'prime quality' whereas on the following day the same expert declared the identical sample 'not prime'. Many experienced growers of hops testified, in effect, that the hops met the standard of quality provided in the contracts. The trial judge, who saw and heard the witnesses testify, found with the grower on the question of quality. After an examination of the record, we have no hesitancy in concurring in such findings."

Meaning of trade terms used in the contract. Appellant's other principal contention seems to be (Br. 22) "that the expression 'prime quality' means

[17a] "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

exactly what the rest of the warranty specifies," plus an additional item, freedom from mildew, not mentioned in the contract. Appellant then assumes that the terms used have meanings quite different from what in fact the parties understood.

The contract uses several phrases to describe "prime quality." To be "prime" it is said that hops must be "cleanly picked," "good color," etc. But each of those phrases in turn requires definition. For example, "cleanly picked" does not require a total absence of leaves and stems. The contract here itself permits 8% to 10% leaves and stems (G.R. 9); these hops had 8% (G. Ex. 5); an 8% pick was the average considered "prime quality" in 1947 in the Willamette Valley without deduction from the base price (W.R. 197-198, 241, 343, 345); and in fact hops having 13% pick were taken under "prime quality" contracts in Oregon that year (W.R. 241; post, xix). Again, in the trade "good color" means "bright color," whether the color be greenish, yellowish or a combination of the two (G.R. 264, 397).

As applied to these particular hops, appellant's witness Mr. Ray testified (G.R. 481):

> "* * * I assume from the appearance—however, they are more than a year old—that the quality was not damaged by mildew. It appeared to be a good-colored hop, reasonably well picked."

As a matter of fact, the description in the contract of what constitutes a "prime quality" hop might

not even suggest to a layman what it means to a hop grower or dealer. Thus, Mr. Ray described his procedure in examining hops to determine whether or not they were of "prime quality" as follows (G.R. 397):

> "We examine the hops, the visual appearance of the hops; we rub some of the hops up to get an aroma; we feel of the samples to get the feel of the texture of the hop; and in our visual examination we take into consideration the condition and appearance of the lupulin, whether it is in proper condition, whether it has been injured, and also whether or not the hop is cleanly picked and that the color is even, bright, and not blemished with imperfections."

The principal test is for flavor or aroma (G.R. 212, 429, 458, 489). Mr. Ray judged that these hops "had a good flavor" (G.R. 489). Mr. Schwind, the brewmaster who examined samples of these hops when they were fresh, agreed that they had a good flavor. He said (G.R. 212):

> "I took some of the sample and rubbed it and smelled it and saw that is what I wanted."

There is substantial evidence that these hops were of "prime quality"[18] and met each of the descriptive phrases in the quality provisions of the contract to which appellant refers (Br. 20, 22).[19] Appellant's

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18 Evidence that the hops were of "prime quality," see Appendix, post, vii-viii, xv-xx.

19 The hops were not the product of the first year's planting (G.R. 134, 358), not affected by spraying or mold (G.R. 172, 358), in sound condition (G.R. 134, 172, 358), good color (G.R. 134, 179, 481), fully matured (G.R. 134, 179-180), cleanly picked (G.R. 134, 180, 204), free from damage by vermin (G.R. 358, 435), properly dried, cured and baled (post, iii), and in good order and condition (G.R. 135, 181)).

only specific objection to the hops was that they showed some evidence of mildew; mildew is not mentioned in the quality provisions of the contract; and the evidence is that the touch of mildew did not prevent these hops from being "prime quality".[20]

Interpretation to be given trade terms in contract. Now the question is whether appellant can properly ask the Court to ascribe some meaning to the contractual language different from the meaning such language had to the parties who used it. It is clear in such a case under Oregon law, as well as general law, the trade usage must control. Such is the Oregon statutory rule:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." §2-218, O.C.L.A.[21]
>
> "The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a technical, local, or otherwise peculiar signification, and were so used and understood in the particular instance, in which

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20 The only specific objection made by appellant referred to the mildew, and the slight touch of it did not prevent the hops from being "prime," see Appendix, post, iv-v, x-xi, xiv-xv.

21 The provisions of this section are made a specific exception to the statutory parol evidence rule, §2-214, O.C.L.A.: "* * * But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 2-218, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. * * *"

case the agreement shall be construed accordingly." §2-219, O.C.L.A.

It is, of course, the rule followed by the Oregon Court. Thus, in an exhaustive decision, reconciling prior cases, the Court said:

> "[W]e state our conclusion that members of a trade or business group who have employed in their contracts trade terms are entitled to prove that fact in their litigation, and show the meaning of those terms to assist the court in the interpretation of their language." *Hurst v. Lake & Co., Inc.,* 141 Or. 306, 317, 16 P. 2d 627, 631.

The principle was recently again emphasized in *Dorsey v. Oregon Motor Stages,* 183 Or. 494, 504-506, 194 P. 2d 967, 971-972.

Such is also the generally-accepted rule: Restatement of Contracts, §246 and Illustration 7, §248 and Illustration 5; Williston on Contracts, Rev. Ed. §650; Wigmore on Evidence, 3d Ed., §2460; Anson on Contracts (Corbin's Ed., 1919) §351.

It is also the rule applied by the Oregon Court in similar hop cases. For example, in *Wigan v. La Follett,* 84 Or. 488, 165 Pac. 579, the hop buyer introduced evidence that the hops were "dirty picked" and "moldy, 'not a sprinkling of mold, but moldy,' " and it was admitted that the hops contained some which were the product of the first year's planting. The jury found, in effect, that "prime" hops need not be perfect, and that the hops were "prime". In sustaining the judgment the Supreme Court approved the following instruction (84 Or. 502-503):

> "* * * You are to accept the definition of prime quality as laid down in this contract by the parties themselves. You are, however, to consider these terms as used in this contract in the ordinary meaning and acceptation of those terms. *You are to give them such a reasonable construction and meaning as are placed upon them by persons who are engaged in the hop business.*" (Italics ours.)

Appellant's "definite" standard. Appellant's real difficulty here is that it is attempting to obtain "choice" hops or better, for the price of "prime" hops. Appellant says (Br. 22) that there is a never-varying "definite standard" for "prime quality" hops, and then appellant (Br. 23-24) seeks to show what that standard is from cases involving "choice" hop contracts.[22]

Formerly hops were bought from growers on the basis of several grades, and "prime" was an average grade. Thus, in *Lachmund v. Lope Sing,* 54 Or. 106, 109-110, 102 Pac. 598, 599 (1909), it is said:

> "There is evidence offered by the plaintiffs [assignees of hop buyers] tending to show that some portions of the hop field were affected with mold, and that portions of the baled hops, after the harvesting was completed, also contained considerable mold. Hop dealers were

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22 The two cases principally relied upon by appellant (Br. 23-24) are *Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636, which involved a "first quality" or "choice" contract, and *Lilienthal v. McCormick,* 86 Fed. 100, which involved a pleading problem relating to a "choice" hop contract.

Actually the precursor of the present "prime quality" contract would seem to be the former contracts which called for hops "of the first average quality for the year and section," such as was involved in *Catlin v. Jones,* 48 Or. 158, 159, 85 Pac. 515.

> called as witnesses, and testified that hops are graded, according to quality, as medium, medium to prime, prime, prime to choice, and choice, and that contract hops, as defined in the contract, calls for choice hops. Most of the plaintiffs' witnesses testified that defendants' [growers'] hops graded medium to prime—three grades below choice—and one witness testified that they were two grades below choice [i.e., prime]."

That system of grading no longer prevails; now grower-dealer hop contracts call for just "prime quality" (G.R. 283-284, 357, 452, 486). While the great bulk of the hop crop moves under such "prime quality" contracts,[23] appellant says in effect that only the very "top grade" of hops can meet the standard for the sole grade.

The situation here is much like that in *Daniels v. Morris,* 65 Or. 289, 294-295, 130 Pac. 397, 399, 132 Pac. 958. In that case the Oregon Court, experienced in hop litigation, said:

> "The contract calls for hops of prime quality, even color, cleanly picked, and not broken. Plaintiff Daniels [the hop buyer] and other witnesses called by plaintiffs, in describing or defining hops of prime quality, say it is a hop that is cured properly, picked cleanly, dried enough so as to keep, and not overdried. They describe choice hops in practically the same

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23 Mr. Oppenheim testified with respect to Pacific Coast hops in 1947 (G.R. 452): "I would say that possibly 90 to 95 per cent were either under contract or controlled by grower-dealers or dealers who grow hops of their own, or by the Co-op up in Yakima. * * * As far as I know, all contracts are written as prime quality."

terms, and, in distinguishing between prime hops and choice, they were not able to name any differential feature; but we understand from their efforts to describe them that choice hops are hops a little cleaner picked, a little better dried, without being too much dried, and of a little better color than prime hops. In other words, it depends upon the opinion of the person judging, rather than on any accurately definable conditions. If hops are fairly well dried, fairly cleanly picked, and of good color, one expert can consistently pronounce them prime, while another may pronounce them less than prime; and so also as to choice hops. Opinions differ. If a buyer is under contract to buy prime hops and wishes to avoid his contract, it is not difficult to claim the hops as less than prime and to get his friends to agree with him."

In this case appellant's "friends" who pronounced the hops less than prime were Mr. Oppenheim, appellant's president, Mr. Ray, local representative of the other appellant, and Mr. Franklin, who admittedly "didn't see a Willamette Valley hop in 1947" (G.R. 495). They spoke only from samples, not having seen the crop on the vines or in the bales; they restricted their objection to the hops to the sole ground of mildew; and there is some reason for questioning the judgment of each of them. (See Appendix, post, xiii-xv, xviii-xx, xxii-xxiii.)

Mr. Ray admitted that his opinion of "prime quality" did not coincide with the trade practice.

It was his opinion, for example, that hops to be "prime" should be picked 6% or cleaner (W.R. 184, 241). But he admitted that in the trade 8% picking was the general standard for the application of the market-price scale, and in fact hops with 13% leaves and stems were taken under "prime quality" contracts that year (W.R. 179, 184, 241, 251, 255-256). Some of Mr. Ray's own hops that year were mildewed, showed 12% pick, were taken by the hop buyer, and were resold to brewers (W.R. 456-457; W. Ex. 17).

It is the opinion of selected witnesses such as Mr. Ray, whose views confessedly deviate from established trade practice, that appellant's counsel wish to set up as their "definite standard" (Br. 22).

On the other hand, Mr. Oppenheim, appellant's president, testified that hop men differ in their opinions "plenty of times" (G.R. 456). He testified that there is "no fixed standard" for a "prime" hop (S.R. 309-310):

> "Q. Do you sell your hops to brewers as prime hops?
>
> A. Well, we call them prime hops, or we often call them choice hops, too. A choice hop, as I have always understood, to a brewer is the same as a prime hop on the Pacific Coast, because there is no fixed standard, no Government standard. We are an old-time house, and that was customary when I was a boy and got into the business. Our concern always called them choice. Other people call them prime. It is just a matter of custom. * * *

Q. There are no fixed standards for these terms?

A. No, sir."

The lack of a definite standard was also confirmed by Mr. Haas, vice-president of the other appellant (W.R. 457-459).

In appellant's brief (p. 25) it is asserted by counsel that the buyers "are either obligated to deliver to brewers hops of top quality, or would be unable to sell hops of any other grade than top quality." It is suggested, however, that Mr. Oppenheim's testimony is more candid (S.R. 308):

> "We are not specialists in any better than ordinary hops. We are handling the same hops as the other people do."

These were good, merchantable hops, such as were actually accepted in the trade as prime quality. As we have seen, hops are bought by the hop dealers for resale to brewers; all grower-dealer contracts specify prime quality; and it is difficult to say exactly what prime quality is. In view of those facts, appellee introduced evidence on trial to corroborate the testimony that these hops were prime quality by showing that they were good, merchantable hops, equal to the average actually accepted in the trade that year under prime quality contracts. On brief appellant vigorously protests the relevancy of such evidence.

Merchantability. The trial Court found (Appendix, post, x):

> "Said hops when tendered were merchantable."

The finding is supported by substantial evidence (Appendix, post, xv-xvii).

This Court has previously held (*Wolf v. Edmunson,* 240 Fed. 53, 59) that in such a case as this the "merchantable quality of the hops according to the custom of the hop trade" is the "real question of fact" for determination. The Court there approved Judge Wolverton's instruction:

> "I will state further, in this connection, gentlemen of the jury, that these hops were raised for the market, and the contract was made with the market value in view, and, in considering the quality of these hops, you will consider them as merchantable, as the parties themselves desired that the hops should be sold in the market and should be so treated, so that the merchantable value is the thing you are to consider, and not, strictly speaking, the real inherent or chemical value."

Appellant's counsel, however, believe (Br. 34) that "the finding of merchantability is wholly immaterial as it does not determine any issue in this case."

The fact is that it determines an issue raised by appellant's counsel themselves. The underlying theme throughout appellant's argument is that the hop dealer should not be required to pay for the hops because it could not, it is asserted, have resold

them. The evidence and finding that the hops were merchantable (i.e., "fit for sale," "of a quality such as will bring the ordinary market price"—Black's Law Dict., 3d Ed.) directly disposes of that issue.

Appellant on brief (pp. 26-27) states: "No brewer would purchase his requirements without a guarantee of quality, and it is equally true that no buyer would undertake to meet the guarantee without protection in his contract with growers." However, Mr. Oppenheim's testimony is (G.R. 452):

> "Q. Do those contracts [to brewers] contain the same definition which you insert in your growers' contracts?
>
> A. No, I said we simply sell hops as good hops. We don't sell them on any written specifications of cleanly picked hops, properly cured, and so forth. We don't have in our contracts in recent years the usual 8-per cent or 6-per cent picking clause. * * *
>
> Q. You do not have, in your brewers' contracts, this language which appears in the growers' contracts?
>
> A. No, sir."

Mr. Schwind, the only brewmaster called as a witness, testified that, if his brewery had not already been fully supplied, he would have liked to buy the Geschwill hops (G.R. 214). Mr. Schwind said (G.R. 209-210):

> "A. The hops appeared as if they were a good hop.

Q. Would you say they were prime quality hops in the hop trade?

A. When we buy from a grower or dealer, I look for good hops. He can call them what he wants to, prime, or choice, or standard. I think I should know a good hop from a poor hop.

Q. In your opinion, were these good hops?

A. Was good, average hops."

In this connection it should be remembered that the contract price for these hops was the market price on the selected date. The contract provided (G.R. 8-9):

"The price to be paid for the hops to be delivered shall be the Grower's market price for the kind and quality of hops delivered * * *"

The evidence is clear that these hops were of the quality which brought the ordinary market price (Appendix, post, xv-xix).

The buyer dealt in good merchantable hops, and the grower in fact tendered such hops. The quality of the hops tendered was such that they were acceptable to brewers.[24] If appellant miscalculated the

24 Such hops were readily taken by the breweries. As Mr. Willig, manager of the Oregon Hop Producers Cooperative, said with reference to Mr. Wellman's hops which also showed a touch of mildew (W.R. 152-153):

"Q. Would you say from your experience in selling hops over the years that hops of the same general character and quality of these had been accepted under this type of contract?

A. Yes, they had.

Q. In 1947 to whom did you sell your hops?

A. Directly to the breweries.

Q. Did you sell hops to breweries of the same general kind and quality as you have seen here in the courtroom?

A. That is about all we had to sell that year in the form of late hops.

Q. Did they accept them and make beer out of them?

A. That is right."

supply and the market, and contracted to buy larger quantities than it could profitably resell, that provides no basis for rejecting these hops.[25]

These were such hops as were actually accepted in the trade as prime quality. The trial Court found (G.R. 39-40):

> "Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions."

The evidence is that the great part of the 83,000 bales of Oregon hops in 1947 moved in the trade under "prime quality" contracts, and that nearly all the crops showed evidence of mildew (G.R. 250-251, 269, 394). It seems self-evident that the hops with a touch of mildew such as these were in fact accepted in the trade as "prime."

Appellant's counsel (Br. 28, 30) have severely criticized the hop men who spoke of the sole grade of hops ("prime quality") as being "average" or "good average," and whose opinions of "prime quality" did not coincide with counsel's. However, even appellant's witnesses found difficulty in formulating a verbal definition of "prime quality." Mr. Oppenheim said (G.R. 458) that judging a hop comes from experience, "It is hard to write it down in

25 The case is analogous to *Prestige, Inc. v. Schwartzberg, Inc.* (La. App.) 38 So. 2d 169, where the buyer attempted to cancel its order for silk hose on the ground that it was of poor quality, but in fact the hose was as good as or better than comparable products, and the real reason for the attempted cancellation was that the market for silk hose had become limited, it was held that the seller was entitled to recover.

books." Mr. Ray said (G.R. 395) that a definition of "prime quality" is "impossible to put entirely in words."

Accordingly, it seemed relevant to show that as a matter of actual practice such hops as these were accepted in the trade generally as "prime quality." Appellant sought vigorously to prevent appellee from obtaining and from introducing evidence of such actual practices, even though it concerned issues raised by appellant (e.g., W.R. 123-124, 438-441; S.R. 255, 258-259; G.R. 87, 103-104, 106). Nevertheless, the record abundantly supports the finding (Appendix, post, xix).

On brief (p. 31) appellant's objection to this evidence is primarily that it relates to collateral transactions not binding on the parties. But the practices of the trade as to the meaning of a trade term certainly have probative value, just as the practices of the parties under a private contract have as to the meaning of that instrument. "Tell me," said Lord Chancellor Sugden, "what you have done under such a deed, and I will tell you what that deed means." (*Attorney General v. Drummond,* 1 Dr. & War. 353, 368, aff'd 2 H. L. Cas. 837; quoted and applied in *Burton v. O.-W. R. & N. Co.,* 148 Or. 648, 656, 38 P. 2d 72.) It seems equally pertinent to show the Court what the trade has done under a standard form of contract in order that the Court may say what the trade interpretation of that contract is.

"Assumption of risk." Appellant purports to demand only the letter of its contract, and to insist

that each party take the risk which he has assumed. Appellant then argues (Br. 26) that all risk of loss must rest upon the grower:

> "It is true that growers do not have complete control over the quality of hops produced by them, but they have elected to engage in the business of growing hops and from time immemorial farmers and growers of all products have had to assume the risk of poor crops."

Which is to say that, while appellant profits on rising markets, it wishes retroactively to shift to appellee the risk of falling markets on resales.

The evidence is that Mr. Geschwill had a good crop. Even assuming appellant's premise of a "poor crop," however, the argument about the grower's "assumption of risk" is not valid because appellant elected to require appellee to harvest and deliver his crop. The uncontested finding of the trial Court is (G.R. 37; Appendix, post, vi):

> "6. Said agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defendant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's said crop of cluster hops and that said crop when picked and baled would in normal course show such mildew. Defendant elected to and did make plaintiff said advance. Said mildew in said crop did not thereafter become more pronounced or prevalent."

Thus, if the crop was not satisfactory to the buyer, it was not bound to make the harvesting advance. But when the advance was made, the grower was thereby bound to harvest and deliver the crop. The grower could not compain that the buyer wanted the hops with the touch of mildew. The grower naturally relied upon the buyer's election when, with full knowledge of the condition of the crop, the buyer made the advance and required performance by the grower. The buyer should not now be heard to say that it had a secret reservation concerning the mildew then known to exist.[26] As Professor Williston says:

> "The principle is general that wherever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not only asserted but assented to."

Williston on Sales, Rev. Ed., §191c; Williston on Contracts, Rev. Ed., §688; applied in *Sheehan v. McKinstry,* 105 Or. 473, 483, 210 Pac. 167; accord, Restatement of Contracts, §309.

Appellant's other factual contentions. In addition to the matters considered above, appellant has also raised some subsidiary factual issues. These in-

26 As the Oregon Court said of such a clause in the hop contract in *Livesley v. Johnston,* 45 Or. 30, 48, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647: "It was not left to the mere option of Livesley & Co. [the buyer] to advance such funds as and when they saw fit, but they or their agent must pass an honest judgment as to whether or not the crop is in the proper condition; that is, for the production of such hops as is bargained for."

clude: The amount of mildew and Mr. Hoerner's unprecedented experiment (Applt's Br., 28-29, 37; Appendix, post, xi-xii); "selective picking" (Applt's Br., 11; Appendix, post, iii-iv); all of the hops were substantially like that part of them which appellant found acceptable (Applt's Br., 15, 34-35; Appendix, post, xix-xx); the restricted market for resale (Applt's Br., 15, 36-37; Appendix, post, xxii-xxiii); appellant's actual reason for rejecting the hops (Applt's Br. 36; Appendix, post, xiii-xiv). Some of the evidence on these matters has been stated above in the narrative statement of the facts. In addition, the Appendix hereto contains citations to the evidence supporting each of the trial Court's findings which appellant contests.

Tender. As noted above, appellant's sole objection to appellee's tender was and is on the ground of quality. Under the Oregon statute appellant could not now attempt to claim any other ground for the purported rejection. §72-103, O.C.L.A.;[27] *Seidenberg v. Tautfest,* 155 Or. 420, 424, 64 P. 2d 534.[28]

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27 "The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

28 "Regardless of what may be the rule in other jurisdictions, it was incumbent upon the plaintiff [buyer], under the statute of this state, to specify its objections to the hops at the time delivery was tendered. * * * Having objected solely to the quality of the hops at time delivery was tendered, it will not do for the buyer at this time to mend his hold and undertake to justify rejection of the hops on the ground that the grower failed to produce the amount specified in the contract."

Appellant's authorities. Appellant cites (Br., 40-45) a number of cases for the general proposition that, assuming the hops did not conform to the contract:

> "A buyer has a right to performance of the contract of sale in accordance with its terms, and it is no excuse to the seller that some other performance should be just as satisfactory or serviceable."

Of course, the converse is equally true—since, as the Court found, the hops did substantially conform to the contract, appellant was not justified in attempting to reject them.

It should also be noted that the decisions cited by appellant do not involve the same type of factual situation as this case. Here the contract was not for the sale of hops which appellee could have bought on the market for resale. This contract required the appellee to deliver the entire, specified crop from the designated premises (G.R. 7-8; Appendix, post, i-iii). The contract related to specific goods. As Judge Wolverton said of the hop contract in *Livesley v. Johnston,* 45 Or. 30, 52, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647:

> "* * * the contract has reference to the specific property to be produced under its terms * * *"

The Sales Act (§71-176, O.C.L.A.) defines the term "specific goods" to mean "goods identified and agreed upon at the time a contract to sell or a sale is made." Under such contracts as these the goods are "specific". *Pittenger Equipment Co. v. Timber*

Structures, Inc., 50 Or. Adv. Sh. 625, 635, 217 P. 2d 770, 775.

This distinction becomes particularly important in considering appellant's legal arguments below.

Appellant cannot claim a "warranty" that the hops would be any different than in fact they were. Appellant at the time of making the contract for the purchase of the specific hop crop, and also at the time of making the harvesting advance, knew that the crop showed a touch of mildew (Appendix, post, iv-vi). Now appellant says there was an express "warranty" that the hops would be of prime quality, and argues that "prime quality" means totally free of mildew. We have seen that there is substantial evidence the hops were prime quality. But even if that were not true, they were good merchantable hops and appellant could not now assert any such claimed warranty that they would be free of the mildew which appellant knew existed. Appellant cannot claim any such "warranty" for two reasons: (1) appellant did not rely thereon; and, (2) appellant induced appellee to understand that it would not rely thereon. As the trial Court said in his memorandum of decision (G.R. 33):

> "* * * In the Geschwill case the contract was made after the hops were known to be mildewed. * * * Under these circumstances, the buyer cannot now reject the hops on the ground that the hops do not comply with the contract. This would be abhorrent to equity."

Appellant cannot assert a claimed warranty upon which it did not rely. The Sales Act (§71-112, O.C. L.A.) defines an express warranty as follows:[29]

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, *and if the buyer purchases the goods relying thereon.* * * *" (Italics supplied.)

Having contracted to buy the hops knowing of the mildew, appellant did not rely upon, and cannot assert, any claimed warranty to the contrary. *Tomita v. Johnson,* 49 Idaho 643, 290 Pac. 395; *Kraig v. Benjamin,* 111 Conn. 297, 149 Atl. 687.

The Sales Act embodies the common-law principle. As Judge R. S. Bean said (*Abilene Nat. Bank v. Nodine,* 26 Or. 53, 54, 37 Pac. 47):

> "To constitute an express warranty, such as is attempted to be alleged in the answer, there must be, as part of the contract of sale, either an express undertaking to that effect, or some affirmation or representation as to the quality or condition of the thing sold, made at the time of the sale, for the purpose of inducing the buyer to make the contract, *and in either case the buyer must have relied upon the agreement or representation in making the purchase.* It is elementary law that unless the purchaser of personal property relied and acted upon the

29 The same principle applies to implied warranties. §71-115(3), O.C.L.A., provides: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

statement or representation of the seller as to the quality or condition of the thing sold, and was thereby induced to make the purchase, he cannot maintain an action for a breach of warranty; and hence it is sometimes held that a general warranty does not apply to obvious defects known to the purchaser, because, *in the very nature of things, one cannot rely upon the truth of that which he knows to be untrue.* It is therefore essential in an action for a breach of warranty for the purchaser to allege that he relied upon the warranty and was thereby deceived: [citations]." (Italics ours.)

On principle this case is similar to *Gonter v. Klaber*, 67 Wash. 84, 120 Pac. 533. There the plaintiff grower sold his entire hop crop to the defendant dealer, who had received samples and examined a part of the hops prior to the time the contract was entered into. After the contract was signed the price of hops declined, and the buyer made a perfunctory inspection and rejected the hops. The grower resold the crop and sued for the difference between the contract and the resale price. The trial Court found that the quality of the entire crop corresponded to that of the part examined prior to the purchase, and gave judgment for plaintiff. On appeal the judgment was affirmed, the Court saying:

"It is true, an inspection was made and a part of the hops, viz., eighteen bales thereof, were conceded to equal the samples. It is conceded also that the price of hops had declined materially at the time they were inspected. There is some dispute as to whether the inspector re-

> jected hops at the time of the inspection, but it was shown, we think conclusively, that the one hundred bales were all as good as, or better than the eighteen bales which were conceded to be sufficient. We are satisfied, also, that the inspection made was an arbitrary one, for the purpose of avoiding the obligation rather than of determining the quality of the hops, and there is ample evidence to support the finding quoted above that all of the hops were of the same quality and grade as the eighteen bales mentioned."

So here the buyer knew of the mildew when it entered into the contract, and upon the "form" inspection the same touch of mildew was found. The buyer was tendered the identical hops for which it had bargained.

The same principle is illustrated by other cases:

Thus, in *Worthington v. Gwin,* 119 Ala. 44, 24 So. 739, 43 L.R.A. 382, the contract provided that the ore produced should be "free of foreign substance." The court found that the manifest intention of the parties was that the ore should be free of foreign substance "other than such as was contained in the vein of ore." It was held that the pretext of dissatisfaction with some of the ore (actually based upon dissatisfaction with the price) was not sufficient excuse to permit the buyer to repudiate the contract.

In *Standard Cotton-Seed Oil Co. v. Excelsior Refining Co.,* 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386, the contract called for "prime crude

cotton-seed oil". At the time the contract was entered into, late in the season, there could only be produced "prime crude cotton-seed oil of the season". The court held that the article with respect to which the parties were contracting "was necessarily the kind of article which could be manufactured at that late time by the seller".

Even assuming appellant's argument that the hops were inferior for 1947, which argument is not supported by the evidence, the situation here would be similar to that in *Paul v. Salisian,* 87 Cal. App. 721, 262 Pac. 779, in which the court characterized the buyer's appeal as "entirely without merit" where "appellant bargained for the purchase of the raisins after he had fully inspected them and found some to be wet and of inferior grade" and where "after the delivery he discovered that he had made a poor bargain and gave written notice of rescission on the ground of breach of warranty of quality."

Compare also *Loose v. Flickinger,* 121 Cal. App. 77, 8 P 2d 517; *Kenney v. Grogan,* 17 Cal. App. 527, 120 Pac. 433.

Appellant cannot claim a "warranty" which it induced appellee to understand it would not rely on. The point here is another facet of the principle discussed above, pp. 35-37, i.e., when the buyer made the contract, and subsequently the harvesting advance, with knowledge of the mildew, the grower was naturally led to believe that the buyer would not subsequently claim any asserted defect of qual-

ity because of the mildew. Such a defense is contrary to the basic dictates of good faith and fair dealing, as stated by this Court in *Lilienthal v. Cartwright,* 173 Fed. 580, 584:

> "* * * plaintiffs [hop buyers] are now asserting a claim which they or their agent induced the defendant [hop grower] to believe they would not rely on, and upon the faith of which defendant placed himself in a position where he could not carry out his contracts. * * * In Dickerson v. Colgrove, 100 U.S. 578 [581], 25 L. Ed. 618, the Supreme Court of the United States refers to the case of Faxton v. Faxon, 28 Mich. 159 [161], as an authority upon this subject. * * * 'There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.'"

And see *Marshall v. Wilson,* 175 Or. 506, 518, 154 P. 2d 547; *Fried v. Fisher,* 328 Pa. 497, 196 Atl. 39. And see also *Heid Bros. v. Carver,* 94 Colo. 54, 27 P. 2d 756, in which it is said that any other view of the matter "would stultify both parties as well as the court."

II. ISSUE ON FORM OF ACTION

Appellee, having fully performed the contract and having made a valid tender of the hops, can maintain his action to recover the balance due on the contract.

Appellant's first main point, considered above, related to the factual issue about the condition of the hops. Appellant's other main point, to be considered below, is the contention that appellee has mistaken his remedy and can have no relief, because of the application of (A) some provisions of the Uniform Sales Act, and (B) selected provisions of the contract. On this main issue the District Court concluded (G.R. 41-42), and appellee here contends, that upon the facts of this case where the seller fully performed and made a valid tender of the goods, the seller can recover the balance due on the contract.[30]

The Oregon Court has specified the remedies of the unpaid hop grower as follows (*Daniels v. Morris,* 65 Or. 289, 298-299, 130 Pac. 397, 132 Pac. 958):

> "When a buyer refuses to take and pay for property offered by the seller in performance of an executory contract for the sale thereof, the latter has the choice of either of two remedies. He may keep the property on hand subject

30 Both before and after the adoption of the Uniform Sales Act the Oregon Court approved the following statement of the law:

"As held in *Dustan v. McAndrew,* 44 N.Y. 72, upon the failure of a purchaser to perform a contract for the sale of personal property, the vendor, as a general rule, has the election of three remedies: (1) To hold the property for the purchaser, and to recover of him the entire purchase price; (2) to sell it, after notice to the purchaser, as his agent for that purpose, and recover the difference between the contract price and that realized on the sale; (3) to retain it as his own, and recover the difference between the contract and market prices at the time and place of delivery." *Krebs Hop Co. v. Livesley,* 59 Or. 574, 588, 118 Pac. 165, Ann. Cas. 1913C, 758; *Call v. Linn,* 112 Or. 1, 13, 228 Pac. 127.

> to the order of the buyer, after making tender thereof, and maintain an action for the balance of the purchase price, or he may sell the goods for the best price obtainable, and if that is less than the contract price sue the buyer for the difference."

This Court has specified the same remedies as being available to an unpaid hop grower (*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 Fed. 913, 916, cert. den. 242 U.S. 637):

> "Upon the breach of a contract of sale by the purchaser, the seller is at liberty to fully perform on his part, and when he has done all that is necessary to effect a delivery of the property, so as to pass title to the purchaser, he may store or retain it for the purchaser, or he may resell it as agent for the purchaser. If he pursues the former course, he is entitled to maintain an action for the contract price of the goods. If he pursues the latter, his recovery will be the difference between the contract price and the net proceeds of the sale. But it is not obligatory upon him to adopt either of these courses, and if he does not care to do so he is entitled to recover the difference between the contract price and the market price or value of the property at the time and place of delivery fixed by the contract."

Here the grower chose the first remedy and brought his action for the balance of the purchase price. And the trial Court concluded in effect that the form of action was proper (G.R. 42).

This form of action is no novelty—in essence it is common-law assumpsit for the agreed price of goods sold and delivered. *Brigham v. Hibbard,* 28 Or. 386, 387-388, 43 Pac. 383. As Judge Learned Hand has said, the seller's remedy in this type of case "is really a specific performance of the contract." *Pratt Chuck Co. v. Crescent Insulated Wire & Cable Co.,* 33 F. 2d 269, 272. Upon both legal and equitable grounds, under the facts here, the seller should be able to recover the balance due on the contract, just as in Oregon the buyer could have maintained a suit for specific performance to obtain the crop of hops. *Pittenger Equipment Co. v. Timber Structures, Inc.,* 50 Or. Adv. Sh. 625, 217 P. 2d 770; *Livesley v. Johnston,* 45 Or. 30, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647; *Livesley v. Heise,* 45 Or. 148, 76 Pac. 952.

A. Application of Sales Act

Appellant argues that the relief sought by appellee can be obtained only under §63 (1) or (3) of the Sales Act,[31] and that neither subdivision is applicable here. We submit that since the "property"

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31 Contrary to appellant's assumption, it seems that appellee's recovery here would be the same under any other remedy provided by the statute, such as §71-151, O.C.L.A., which makes the buyer liable for wrongful refusal to take delivery, and §71-164, O.C.L.A., which makes the buyer liable for wrongful refusal to accept.

Upon the facts here, especially where the grower could not sell to another without consent of appellant because of the chattel mortgage, the measure of recovery is the entire loss occasioned by the buyer's wrongful conduct. *Stevenson v. Puget Sound Vegetable Grower's Ass'n.,* 172 Wash. 196, 19 P. 2d 925. As the Washington Court there said (19 P. 2d at 927): "This cause of action is governed * * * by the fact that there was no available market for the goods in question other than that of appellant, whose contract withheld the sale of the peas by respondent to any other person or persons." In effect the same circumstance is present here (Appendix, post. xxiii).

in the hops passed to the buyer the action lies under §63(1), and that even if §63(1) were not applicable the action would lie under §63(3).

(1) The "property" in the hops passed to the buyer, and the seller may maintain his action for the balance of the purchase price under §63(1) of the Uniform Sales Act.

(This subdivision is in answer to the argument in Appellant's Brief, pp. 48-61.)

§63(1) of the statute (§71-163(1), O.C.L.A.) provides:

> "Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods."

The statute provides that the remedy is available to the seller where both the property in the goods has passed to the buyer, and the buyer has wrongfully failed to pay the price. The statute does not contemplate that, after the seller has fully performed and made a valid tender of the goods, the buyer can then prevent the property in the goods from passing merely by wrongfully refusing to accept the goods and to pay for them. Indeed, the Sales Act provides that it is the "duty" of the buyer "to accept and pay for them, in accordance with the terms of the contract to sell or sale." (§71-141, O.C.L.A.)

Here the contract, which was made when the hops were formed and in existence on the vines, was for the sale and purchase of the designated hop crop. The contract involved "specific goods." See above, pp. 39-40, and also *Kenney v. Grogan,* 17 Cal. App. 527, 120 Pac. 433 (olives on the trees); *Breden v. Johnson,* 56 N.D. 921, 219 N.W. 946 (growing hay).

Under Rules 2 and 5 of §71-119, O.C.L.A.,[32] the property in the goods passed to the buyer when the seller completed the work necessary to put the specific goods in a deliverable state and delivered the same in warehouse. *Turner v. Benz Bros. & Co.,* 153 Wash. 123, 279 Pac. 398 (the property in the hay passed when it was baled, even though unpaid seller retained possession); *Inland Seed Co. v. Washington-Idaho Seed Co.,* 160 Wash. 244, 294 Pac. 991 (property in peas passed when delivered to warehouse). And see *Fischer v. Means,* 88 Cal. App. 2d 137, 198 P. 2d 389.

The rule of law is summarized by Professor Williston as follows:

> "When the seller has completed any act remaining to be done by him, the property will thereupon pass without further expression of

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32 "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: * * *

"Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done. * * *

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

assent by the parties." Williston on Sales, Rev. Ed., §265.

"The most noticeable circumstance tending to show an intent to transfer the ownership is delivery of the goods to the buyer. It has already been observed [*ibid.*, §265] that even though something remains to be done to put the goods in a deliverable condition, actual delivery of them indicates, in the absence of express contrary statement, an intent to transfer the property immediately. This is still more clearly true where nothing remains to be done but weighing or measuring to fix the price." Williston on Sales, Rev. Ed., §269.

If the dealer had decided to take the clusters (as it did the fuggles), it would have taken the very hops which had been sampled, marked and weighed in by the buyer's agents, and set aside in the warehouse. The delivery was complete in accordance with the terms of the contract. The buyer could not defeat that delivery by a subsequent wrongful rejection of quality. *Katz v. Delohery Hat Co.*, 97 Conn. 665, 118 Atl. 88.

Ordinarily, when the bales of hops had been inspected, marked and weighed in at the warehouse, it would have been considered in the hop trade that the buyer had accepted the quality of the hops. In this case the grower allowed the buyer's request for additional time to consider the quality. The property in the hops passed to the buyer, but subject to being defeated upon occurrence of a condition subsequent if the goods had not been of the

quality bargained for. This distinction between the passing of the property in the goods and the acceptance of quality is carefully drawn by Judge Cardozo in *Henry Glass & Co. v. Misroch,* 239 N.Y. 475, 147 N.E. 71. It is there also said (147 N.E. at 74) that the right which exists, after the property passes, to examine and reject is "a condition subsequent, and its exercise does not bar an action for the price if the goods rejected were in truth in a deliverable state." And see also *Delaware, Lackawanna & Western R.R. Co. v. U. S.,* 231 U.S. 363, 34 S. Ct. 65, 58 L. Ed. 269.

Ordinarily, under the Uniform Sales Act, where the property in the goods has passed to the buyer, the unpaid seller may still retain a "lien" on the goods for the price.[33] Thus, the seller is "not obliged to turn over his warehouse receipts before receiving payment." *Seidenberg v. Tautfest, supra,* 155 Or. at 426. And where, as here, the goods are of a perishable nature, or the buyer has been in default an unreasonable time, the unpaid seller may resell the goods and maintain an action against the original buyer

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33 "The seller's right, therefore, though habitually called a lien is much greater than a lien as that word is strictly defined." Williston on Sales, Rev. Ed., §505.

§71-152, O.C.L.A.: "The seller of goods is deemed to be an unpaid seller within the meaning of this act:

"(a) When the whole of the price has not been paid or tendered. * * *"

§71-153, O.C.L.A.: "Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has:

"(a) A lien on the goods or right to retain them for the price while he is in possession of them. * * *"

§71-154(2), O.C.L.A.: "The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer."

for the difference between the contract price and the resale proceeds. (Appendix, post, xx-xxii; §71-160, O.C.L.A.; *Urbansky v. Kutinsky,* 86 Conn. 22, 84 Atl. 317, 320.) Because of the chattel mortgage feature of this case, however, the grower did not in reality have any such right, and it was necessary to resell the hops upon the conditions imposed by the appellant (Appendix, post, xx-xxiii, note 38a, p. 67).

Appellant's contention that it prevented the property in the hops from passing to it simply by refusing to accept and pay for the hops. Appellant argues that it could, and did, prevent the "property" in the goods from passing by the mere refusal to accept and pay for them. On this theory appellant's very wrong would be its defense. Appellant's contention, in counsel's own words, is (Br. 51-52):

> "It follows that if all the hops presented to the buyer for inspection are rejected by it, title to none of them passes to the buyer. This is true whether the hops are rejected rightfully or without justification. * * *
>
> "Inasmuch as the defendant did not accept and request delivery of any of the hops presented to it for inspection, and did not tender to the plaintiff the price of any such hops, title to none of them passed to the defendant."

Even if payment were a condition to the passing of the property in the goods, appellant could not wrongfully prevent the condition from occurring and then defend upon the ground that the condition did not occur.

"It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure. The illustrations of this principle are numerous. * * * One who promises to buy goods if satisfactory cannot set up the failure to perform the condition if by refusing to examine the goods he has prevented the condition from happening. One who agrees to pay for goods on delivery cannot set up lack of delivery when caused by his own act. The principle that prevention by one party excuses performance by the other, both of a condition and of a promise, may be laid down broadly for all cases. The condition is excused because the promisor has caused the non-performance of the condition." Williston on Contracts, Rev. Ed., §677.

"A refusal to examine the promisor's performance, or a rejection of it, not in reality based on its unsatisfactory nature, but on fictitious grounds or none at all, will amount to prevention of performance of the condition and excuse it." Williston on Contracts, Rev. Ed., §675A.

With particular reference to appellant's argument here, Professor Williston says:

"Where the property in goods which are the subject of a bargain has passed and the buyer wrongfully neglects or refuses to pay for them, the seller may recover the price, even though the buyer refuses to accept delivery. Not only

where the legal title has passed to the buyer is the full contract price recoverable on the buyer's breach of contract, but the same result is reached where the beneficial interest has been transferred and the retention of the legal title by the seller is merely for security, as in the case of conditional sales and analogous situations." Williston on Contracts, Rev. Ed., §1364.

The Oregon Court has also held contrary to appellant's argument. Thus, in *Livesley v. Johnston, supra,* 45 Or. at 47, 76 Pac. at 950, where the hop contract gave the buyer much more latitude than here, Judge Wolverton said:

> "Livesley & Co. [the buyer] could not reject the hops upon mere whim or sheer volition, but must in good faith exercise an honest judgment in the premises, and unless they, by themselves or through their agent, so rejected them, *they would nevertheless be bound for the price.*" (Italics ours.)

Appellant contends (B. 50-51) that the buyer can by the terms of the contract prevent the property in the hops from passing by rejecting the quality of the hops "without justification". This precise point was held to the contrary in *Lehman v. Salzgeber,* 124 Fed. 479. There the buyer was suing the seller for failure to deliver the hops. The seller demurred on the ground that there was a want of mutuality in that the buyer was not bound to accept and pay for the hops. The Court held that payment was not discretionary on the part of the buyer. Judge Bellinger said:

> "I am of the opinion that the clause, 'and upon delivery and acceptance of said hops, the said parties of the second part [the buyer] will pay,' etc., does not confer upon plaintiff [buyer] the right arbitrarily to refuse to accept hops when of the quality described; that this clause is intended to fix the time of payment, not to make such payment discretionary on the plaintiff's part; that if the hops are of the quality stipulated for in the contract, and are baled as required by its terms, the obligation of the plaintiff to accept them is absolute."

Since the hops conformed to the contract and the purported rejection was wrongful, the seller may maintain his action for the balance of the price due. As Judge R. S. Bean said in *Brigham v. Hibbard,* 28 Or. 386, 387-388, 43 Pac. 383:[34]

> "The first assignment of error is based on the contention that in an action for goods sold and delivered the plaintiff must not only prove a sale and delivery, but an actual acceptance by the vendee. We do not so understand the law. When it is sought to give validity to a contract, void under the statute of frauds, there must not only be a delivery but an actual receipt and acceptance of the goods by the buyer: [citations]. But where the contract itself is valid, a delivery pursuant to its terms, at the place

34 And see *Katz v. Delohery Hat Co.,* 97 Conn. 665, 118 Atl. 88, 90, where it is said:

"'* * * the fact that the defendant [buyer] had the right to inspect the fur and refuse to accept it if not of the character and quality called for by the contract did not entitled him to refuse to accept fur of the character and quality called for by the contract, title to which had passed to him by delivery, and thereby deprive the seller of his right of action for the purchase price and remit him to an action for damages for nonacceptance."

> and in the manner agreed upon, if the goods conform to the contract, will sustain an action for goods sold and delivered, without any formal acceptance by the buyer: [citations]. The buyer has a reasonable time after the delivery in which to examine the goods, and, if they are not of a kind and quality ordered, he may then refuse to accept them, and thereby rescind the contract; but this right does not prevent the title from passing nor a recovery by the seller in an action for goods sold and delivered, if in fact they do conform to the terms of the contract: [citation]."

Appellant's contention (Br. 52-56) that this was a "cash sale", and that in such a sale where the buyer wrongfully violates its promise to pay for the goods it cannot be held for the purchase price. Probably Mr. Geschwill could originally have refused to deliver the hops unless appellant was then ready, able and willing to pay for them. However, Mr. Geschwill did not insist upon immediate payment, but upon appellant's demand allowed it additional time to consider the quality of the hops. Appellant, having thereby avoided the obligation to pay immediately upon weighing in the hops, now contends that this nevertheless remained a "cash sale".

Regardless of whether or not a buyer can so rely upon its wrongful conduct for its defense, it is clear that after the seller did not insist upon immediate payment there was no longer a "cash sale".

"And after delivery [in a cash sale] the title remains in the seller *unless he waives the right to*

treat the sale as a cash transaction." Weyerhaeuser Co. v. First Nat. Bank, 150 Or. 172, 195, 38 P. 2d 48, 43 P. 2d 1078. The leading case on this subject in Oregon (the Court said in *Keegan v. Lenzie,* 171 Or. 194, 217, 135 P. 2d 717) is *Johnson v. Iankovetz,* 57 Or. 24, 102 Pac. 799, 110 Pac. 398, 29 L.R.A. (N.S.) 709. In the *Johnson* case the rule is stated:

> "If the delivery is voluntarily made, without immediate payment being insisted on, the condition is waived."

Appellant's argument that a conditional title passed to appellant and was revested in the seller. Appellant states the law to be:

> "* * * while delivery to a * * * warehouse pursuant to agreement, does amount to an appropriation with assent, such assent is subject to withdrawal and is withdrawn if, following an inspection, the goods are rejected because not of the quality or condition described in the contract." (Br. 60.)

This only raises the factual issue again. The trial Court found that the hops substantially conformed to the quality provisions of the contract, and we have hereinbefore submitted that the finding is clearly supported by the evidence.

It should be noted that appellant assumes the hops were "unascertained or future goods". We have cited authorities above to show that the hops were "specific goods". The difference here is whether Rule 2 or Rule 4(1) of §71-119, O.C.L.A., governs as to the passing of the property in the

goods to the buyer.[35] Even if the designated hop crop were deemed to constitute "unascertained or future" goods, however, it is clear that the property nevertheless did pass to the buyer (Appendix, post, vi-vii, viii).

Contrary to the statement quoted above from page 60 of appellant's brief, counsel say on page 12:

> "* * * there is no evidence that the defendant expressed any assent whatever, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff."

Of course, as appellant has so carefully indicated (Br. 56 et seq.) "assent" as used in the statute and the finding has no such meaning. As Judge Cardozo said in *Henry Glass & Co. v. Misroch,* 239 N.Y. 475, 147 N.E. 71, 73:

> "The defendant insists that the goods are not appropriated to a contract with the assent of the buyer until the buyer has so manifested his approval of their quality as to preclude him thereafter from giving notice of rescission. * * * We think assent to appropriation is something more immediate and certain. It does not signify an acceptance so definitive and deliberate as to bar rescission for defects. * * * It signifies the buyer's willingness to take as his own the

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35 Rule 2: "Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done."

Rule 4(1): "Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."

> goods appropriated by the seller, subject to rescission and return if defects are afterwards discovered. * * * This does not mean that a buyer is helpless if the goods when they reach their destination are found to be defective. * * * On the other hand, his assent will stand, and may not be retracted, if the variance is pretended."

There is no question that if appellant had wanted clusters (as it did fuggles) it would have taken the identical bales which its agents had sampled, marked and weighed in at the warehouse. Having assented to the appropriation of those hops to the contract, appellant cannot rescind upon a pretended defect in quality.

(2) Even if appellant's theory were correct that the "property" in the hops had not passed to the buyer, still the seller's action for the balance of the purchase price could be maintained under §63(3) of the Uniform Sales Act.

(This subdivision is in answer to the argument in Appellant's Brief, 47-48.)

§63(3) of the statute (§71-163 (3), O.C.L.A.) provides:

> "Although the property in the goods has not passed, if they can not readily be resold for a reasonable price, and if the provisions of section 71-164(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

(§71-164(4)[36] relates to the situation where the buyer repudiates the contract while something remains to be done by the seller, and is not applicable on the facts in this case.)

The relevant portions of the Court's findings are (G.R. 36, 38-39, 40):

> "The agreement provided that defendant would have a prior lien upon said hop crop for such advance payment. and the defendant duly caused said agreement to be filed as a chattel mortgage in the records of Marion County, Oregon." (No error claimed by appellant.)
>
> "Upon delivery as aforesaid plaintiff duly tendered said entire crop of hops to defendant in warehouse at the place specified in said agreement, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof except for said partial advance payment. Said hops, as defendant knew, continued to be held by the warehouseman until disposed of as hereinafter stated. Defendant at all times knew it could obtain said hops upon payment of the balance of said purchase price." (No error claimed by appellant.)
>
> "Hops are of a perishable nature; there had been a material decline in the general market

36 §71-164(4), O.C.L.A.: "If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

price and demand for 1947 Oregon cluster hops; and the hops here involved could not readily be resold." (Appellant contests these findings in part, but they are supported by substantial evidence; see Appendix, post, xx-xxiii.)

"Said resale was made pursuant to the stipulation between the parties of March 30, 1948 [after this action was commenced]. By said stipulation, upon certain conditions imposed by defendant, which conditions were met, defendant did not object to the resale and released the chattel mortgage." (No error claimed by appellant.)

Upon these facts appellant's only objection (Br. 47) to the application of the statute is the asserted lack of formal notice to the buyer that the seller was holding the goods as bailee.

The evidence is that, after the hops were weighed in and set aside for the buyer at the warehouse, Mr. Geschwill called at Mr. Paulus' office to see about his money (G.R. 117-118); and, after the purported rejection of the hops, Mr. Geschwill tried to prevail upon appellant to pay for the hops (G.R. 185-186; G. Exs. 24, 43) though appellant continued to refuse payment (G. Exs. 25, 41, 42).

The buyer knew that the goods were in the possesion of the warehouseman, and the buyer knew it could obtain the hops at any time upon payment of the purchase price. The buyer in fact had the notice contemplated by the statute. Any more formal notification by the seller would have been

vain and idle. As it is said in *Lannom Mfg. Co. v. Strauss Co.*, 235 Iowa 97, 15 N.W. 2d 899, 902:

> "Plaintiff has attempted to deliver the goods to defendant and has treated them as belonging to defendant. This was the equivalent of offering to deliver the goods and notifying the defendant that they were held for defendant."

The Oregon court found a similar contention (i.e., that the tender was insufficient) made by the hop buyer in *Seidenberg v. Tautfest,* 155 Or. 420, 425-426, 64 P. 2d 534, to be without merit:

> "It is argued that the seller did not make a sufficient tender of the hops, but we see little merit in such contention. * * * The more pertinent inquiry is: Did the buyer really desire to accept the hops? Or was it seeking an excuse to avoid its contract? When the rejection was made, it would have been a vain and idle thing for the seller to have made further tender of the hops: [citing cases]."

Indeed, in this case appellant had something much more than mere notice—appellant had a recorded chattel mortgage.[37] Mr. Geschwill was forbidden by statute from reselling the hops without appellant's written consent (§23-524, O.C.L.A.; Appendix, post, xxiii).

The situation here is similar to the case where the buyer has possession of the goods but refuses to accept. In such a case Judge Learned Hand has

37 On appellant's theory—that the hops did not comply with the warranty, and that the mortgage condition had been broken by not repaying the advance—the buyer had such title in the hops that, for example, it could have maintained replevin. *McNeff v. Southern Pacific Co.*, 61 Or. 22, 27-28, 120 Pac. 6. And see note 38a, p. 67.

said (*Pratt Chuck Co. v. Crescent Insulated Wire & Cable Co.*, 33 F. 2d 269, 272) with reference to the statutory notice to the buyer that the seller is holding as bailee:

> "[I]t cannot be argued that the seller puts himself out of court, when by an actual delivery he goes further in his performance than if the goods still remained in his possession. The situation is more favorable to the buyer than that literally prescribed; he has his goods, and need not depend upon the seller's delivery."

In the instant case the buyer not only knew that the goods awaited him at the warehouse, he also knew that as a practical matter the seller could do nothing other than hold the hops for the buyer.

B. Application of Contract

The buyer's printed-form contract has several references to various remedies. Some examples are:

(1) If before or during the time of picking the hops are not of the quality called for by the contract, the buyer is discharged of its obligation to make harvesting advances, and the contract then stands as a chattel mortgage on all the crop for the advances previously made (G.R. 11-12).

(2) Upon starting picking the seller is required to insure the crop for its full market value against loss by fire, with the full loss payable to the buyer; and if the seller does not obtain such insurance the buyer may do so, and the seller is then required to repay the buyer for the premiums with interest (G.R. 12).

(3) If the seller assigns the contract, leases the hop yard, suffers any judgment lien thereon, etc., without the written consent of the buyer, the buyer may at its option rescind and "immediately" have a right of action against the seller "for the recovery of any and all damages resulting on account thereof to the said buyer" (G.R. 14-15).

(4) The entire crop is mortgaged as security for the buyer's advance payments and "liquidated damages," and in case the seller parts with possession of any of the hops, or removes any of them from the county, the buyer may take possession and may sell the crop at public or private sale (G.R. 14).

(5) The contract contains a "liquidated damages" provision (G.R. 13) to which appellant directs particular attention (Br., 62-63): "The parties hereto further agree that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages."

(1) *Appellant's argument on "liquidated damages" clause.*

Appellant argues (Br., 62-63) that, assuming it wrongfully rejected the hops, nevertheless the

quoted "liquidated damages" provision is "binding" upon the grower,

> "and, as a result, that he is precluded from recovering the price of such hops and is limited in his recovery to the difference between the contract price selected by him and the market value at Mt. Angel, Oregon, on the date of delivery of the hops to the warehouse in that city. Inasmuch as the contract price of the plaintiff's hops and the market value of prime quality hops were exactly the same, at the time and place of delivery, the plaintiff was not damaged to any extent whatever and is not entitled to recover anything in this action * * *" (Applt's Br., 63.)

Appellant declares that the clause is not for "liquidated damages," as the contract says, but rather a limitation on appellant's liability (Br. 64-65), and at the same time a "good faith attempt" to provide the grower "fair compensation" (Br., 68). "This means that there can be no recovery whatever by the plaintiff in this action, but it does not follow that this result imposes any undue hardship on him."[38] (Br., 69.)

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38 " 'The law, following the dictates of equity and natural justice in cases of this kind, adopts the principle of just compensation for the loss or injury actually sustained, considering it no greater violation of this principle to confine the injured party to the recovery of less than to enable him by the aid of a court to extort more. * * * This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the law of the contract; *and they will not permit the parties by express stipulation or any form of language, however clear the intent, to set it aside.*' " *Wilhelm v. Eaves*, 21 Or. 194, 200, 27 Pac. 1053, 14 L.R.A. 297; Italics ours.

" 'Just compensation for the injuries sustained is the principle at which the law aims, and the parties will not be permitted by express stipulation to set this principle aside.' " *Electrical Products Corp. v. Ziegler Drug Stores, Inc.*, 141 Or. 117, 125, 10 P. 2d 910, 15 P. 2d 1078.

As we have seen, appellee delivered the hops in warehouse early in September. Appellee could not then have resold them to anyone else. Appellant did not attempt to reject them until the end of October. By law an unpaid seller may, but is not required to, resell the goods, but appellee could not have resold these hops without appellant's written consent as mortgagee.[38a] In fact appellee could not then have resold the hops because of the very restricted market. (See also Appendix, post, vi-vii, x, xx-xxiii.)

(2) *Interpretation of "liquidated damages" clause in relation to the whole contract.*

The rule for interpreting such a "liquidated damages" clause in a hop contract has been indicated by the Oregon Court in *Wigan v. LaFollett,* 84 Or. 488, 497, 499, 165 Pac. 579, as follows:

> "To begin with it seems that the contract is a mutual one and binds the purchasers to accept and pay for the crop raised on the premises,

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38a §23-524, O.C.L.A.: *"If any bailee,* with or without hire, *including every mortgagor of personal property* having possession of property mortgaged, or any purchaser or lessee of personal property, obtaining the possession thereof under a written or printed contract of conditional sale, providing that title thereto shall not vest in the purchaser until the unpaid balance of the purchase price is wholly paid for, and before same is wholly paid for, shall embezzle or wrongfully convert to his own use, or shall secrete or conceal, with intent to convert to his own use, or *shall* injure, destroy, *sell,* give away, remove from the county where situated when obtained, *without the written consent of such bailor or vendor,* or shall fail, neglect, or refuse to deliver, keep, or account for, according to the nature of his trust, any money or property of another delivered or intrusted to his care, control, or use, and which may be subject of larceny, *such bailee, upon conviction thereof, shall be deemed guilty of larceny* and punished accordingly; * * *"

Before the statute was amended to its present form, treating a mortgagor of personal property as a bailee, it was held that a mortgagor could sell the personalty subject to the lien of the mortgage. *Jacobs v. McCalley,* 8 Or. 124. But now after the amendment that can no longer be done. *Mayes v. Stephens,* 38 Or. 512, 518, 63 Pac. 760, 64 Pac. 319.

as well as the vendors to sell the same although there should be less than 30,000 pounds, the maximum amount bargained for. It was a mutual adventure. It is not a mere option in favor of the purchasers. * * *

"In making a memorandum of the agreement the parties used a lengthy, ready-made form in print, adapted to nearly all conditions. In construing the same it is not a question as to what one clause of it indicates, but what the whole agreement means, viewed in the light of the prevailing conditions and circumstances which were within the contemplation of the parties thereto at the time of its execution. * * * According to the construction which we have given to the contract it is incumbent upon the plaintiffs [buyers] to carry out the same, unless there is a default on the part of the vendors; * * * "

Thus, the intent of the parties is to be determined from the clause in relationship to the whole contract and the attendant circumstances, bearing in mind that the agreement is not a mere option in favor of the buyer but obligates each party to perform.

The "liquidated damages" clause here by its language relates to an action for damages, and not to an action such as this for the balance of the price. There is a well-recognized distinction between an action on the contract for the price and an action for damages for breach of the contract. This clause relates to a breach of the contract while it is still executory. Here the seller had fully performed and

made a valid tender—on his part the contract was executed.

The damage provision does not say it provides an exclusive remedy, and any such construction would be inconsistent with the rest of the contract. Thus, for example, if the seller should sell or lease the hop yard in the middle of the year, the buyer would not be required to wait until the time for delivery, but by another clause "immediately" the buyer would "have the right of action against the said seller for the recovery of any and all damages resulting on account thereof to the said buyer" (G.R. 14-15). Indeed, the buyer has such an immediate right of action for the recovery of any and all damages "in case the said seller shall violate *any* of the provisions and conditions in this contract on his part to be performed." (G.R. 15.)

The clause appears in the buyer's form contract for the protection of the buyer. Its object, however, is not to attempt to deny the seller any relief whatsoever in case the buyer defaults in payment, but rather to give the buyer an additional remedy in case the seller breaches the contract. *Without* such a clause this Court held that, in case of breach by the seller, the buyer did not have a lien upon the hop crop for damages, but only for advances. *Lilienthal v. McCormick,* 117 Fed. 89, 98-99. *With* such a clause the Oregon Court held that, in case of breach by the seller, the buyer had a lien on the hops for both damages and advances. *McNeff v. Southern Pacific Co.*, 61 Or. 22, 30-31, 120 Pac. 6.

By its terms the clause relates to damages for breach and not to an action for the price as here. It purports to relate to both parties alike. It does not purport to provide an exclusive remedy for either party. It does not purport to deny either party any relief whatsoever. To construe it otherwise would nullify other provisions of the contract. The only reasonable construction is that the clause gives a permissive, but not an exclusive, remedy to the injured party, and also operates to extend the buyer's lien in case of breach by the seller. It was clearly not intended to substitute a sham or illusory remedy for the practical and long-established remedies applicable in such cases.[39]

(3) *The reason for the clause fails upon the facts of this case.*

The "liquidated damages" clause states a measure of damages for which sellers frequently elect to sue defaulting buyers, for the reason that ordinarily sellers are able readily to resell the goods on an open market and thereby promptly recoup a portion of their losses. But such are not the facts in this case. Here there was no "open" market because dealers generally will not consider the purchase of hops under mortgage to another dealer, even if the

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39 The clause imposes the same measure of damages for any breach of any term, however trivial. Further, it provides no certain measure of damages for any situation where the amount of damages would otherwise be more difficult to ascertain or compute. The clause would be harmless if restricted to a situation where the law would provide the same measure of damages in the absence of the provision. But if the clause were sought to be applied in any other situation, it would under Oregon law result in an unenforceable penalty or forfeiture. *Electrical Products Corp. v. Ziegler Drug Stores,* 141 Or. 117, 10 P. 2d 910, 15 P. 2d 1078.

grower could have obtained the mortgagee's permission to resell. There was practically no "market" because few purchases were being made by dealers. Where the reason for the rule of damages fails, the rule is not applied. §71-164(2); *Hockersmith v. Hanley,* 29 Or. 27, 36, 44 Pac. 497.

(4) *Upon the facts appellant cannot assert its construction of the clause.*

Where the terms of a buyer's contract so severely restrict the power of a seller to dispose of the goods upon an open market, and where a buyer is not disposed to waive or ameliorate the restrictions (G.R. 123-125, 468), the buyer can hardly declare that the seller's damages must be assessed as if the seller had in fact had full power to resell.

(5) *Oregon cases interpreting similar clauses.*

Such contractual provisions are not construed to exclude other remedies provided by law. For example, in *McNeff v. Southern Pacific Co.,* 61 Or. 22, 120 Pac. 6, the hop contract contained a chattel mortgage provision which (61 Or. at 24) specified that upon breach the buyer could foreclose. Instead, after condition broken, the mortgagee brought replevin to recover the possession of the hops. The Court held (61 Or. at 29) that the action would lie, and that foreclosure was not exclusive as a remedy.

Appellant cites (Br., 65) *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958, as authority in its favor. We believe the case to be authority to the

contrary. When the hops were tendered the market was below the price fixed in the contract, and the plaintiffs-buyers "were anxious to be relieved from taking the hops." The buyers rejected the hops, claiming them to be slack-dried, but on trial it was found that they were prime. In the *Daniels* case, however, the sellers resold the hops for their own account and also kept the advances, the total being in excess of the contract price. The buyers sued to recover the advances. By the final judgment of the Court the growers were made whole, but the buyers recouped the overplus to apply on the advances. On rehearing the Court explained its decision as follows (65 Or. at 299):

> "They [the growers] claim only $800 damages for the alleged breach by the plaintiffs of the contract pleaded, and not only kept $1,576.32 advanced, *but also resold the hops for their own account,* keeping the proceeds. *By so doing they waive performance of the contract by the plaintiffs* [*buyers*], *and can only hold them for damages* resulting from the breach of the agreement. Compensation is all that can be allowed in such instances. The defendants are entitled to be made whole, and no more. They cannot sell the hops for their own account, and also keep the money paid on the purchase price beyond enough to cover the damage they have suffered." (Italics ours.)

The contract in the *Daniels* case contained a damage provision similar to the one here. The growers did not elect to sue on the contract for the

price, and accordingly the damage clause was relevant. The Court said, however, that the growers could have done as Mr. Geschwill has done here, i.e., hold the goods for the buyer "and maintain an action for the balance of the purchase price."

In the *Daniels* case the Oregon Court recognized the right of the seller under such a contract as this to sue for the contract price. The Court insisted upon just compensation. The Court did not hold that the seller's recovery, notwithstanding the buyer's default, should be zero as appellant here contends. Nor has any other Court, so far as we can determine, applied such a rule to a situation like ours.

(6) *The "liquidated damages" clause gives appellant no license to repudiate its contract with impunity.*

While the remedy which the seller has pursued here—an action for the balance of the purchase price—has long been well-established in law, it is in effect a specific performance of the contract. And the same facts, and the same reasons, exist in this case as would support a suit for specific performance by the vendor. The contract involves a commodity of speculative value in the sense that the hop market is subject to extreme fluctuation. The measure of the grower's damages, as proposed by appellant, would be grossly inadequate. In Oregon the buyer could obtain specific performance, and the seller should have mutuality of remedy. As

it is stated in Walsh on Equity, §68, p. 341:

> "A vendor of land or of a unique chattel or of stock or other personalty of speculative value may enforce specific performance against the purchaser just as the purchaser may enforce specific performance against him, and for exactly the same reason, viz., the inadequacy of damages. * * * The contract gives him a right to the purchase price, and to permit the purchaser to pay damages at his option instead of performing the contract would surely be a 'travesty of justice,' as it has been called by the Supreme Court of the United States."[40]

The fact that there is a liquidated damages clause in the contract does not vary the result. In *Armstrong v. Stiffler,* 189 Md. 630, 56 A. 2d 808, it was unsuccessfully contended that the remedy provided by the contractual damage clause was exclusive, and that a suit for specific performance would not lie. In holding to the contrary the Court said (56 A. 2d at 810):

> "Normally contracts are made to be performed, not to give an option to perform or pay damages. [Citation.] Forfeiture and damage clauses are means to insure performance, not optional alternatives for performance. [Citation.] There is nothing in these option agreements which indicates that the liquidated

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40 "The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach." Mr. Chief Justice Fuller in *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.,* 163 U.S. 564, 600, 16 S. Ct. 1173, 41 L. Ed. 265.

damage clause gives a license to break the contract and pay damages."

On a parity of reasoning, there is nothing here which indicates that appellant had license to repudiate the contract with complete impunity.

CONCLUSION

We respectfully submit that the trial Court's findings are clearly supported by the facts, that the Court's conclusions are sound in law, and that the findings and conclusions support the judgment.

Respectfully submitted,

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Portland, Oregon
July 20, 1950.

APPENDIX A

Explanatory Note: This appendix consists of the trial Court's findings of fact (G. R. 35-41), references to appellant's specifications of asserted error (Br. 10-16), and citations to the supporting evidence. The portions of the findings which are questioned by appellant are printed in italics, and the number following each italicized portion corresponds to the number of appellant's asserted error relating thereto.

Finding "1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of New York."

Asserted error: None.

Finding "2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000; and this Court has jurisdiction of the subject-matter, the parties and the cause of action."

Asserted error: None.

Finding "3. On or about August 18, 1947, plaintiff as seller and defendant as buyer entered into the written agreement received in evidence herein. *By said agreement plaintiff contracted to sell and defendant contracted to buy the entire crop of cluster hops grown by plaintiff in 1947 on certain prem-*

ises in Marion County, Oregon.[1] Pursuant to said contract plaintiff cultivated and completed the cultivation of said premises and *duly harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner.*[2] (As part of the same transaction defendant also contracted to buy a certain crop of fuggle hops from plaintiff, but said fuggle hops were duly paid for and there is no controversy here on that matter.)"

Asserted error No. 1 (Applt's Br. 10) to finding that the parties bargained for the "entire crop". This finding uses language from the contract (G. Ex. 1; G. R. 8):

> "...the seller does hereby bargain and sell,.... and agrees to deliver . . . to the buyer, . . . *entire crop estimated at—twenty thousand*—thousand pounds (*20,000* lbs.) of *Cluster* hops grown on said premises . . ." (The italicized matter was typewritten on the printed form contract.)

The printed clause to which appellant refers is (G. Ex. 1; G. R. 10):

> ". . . the buyer . . . is to have the right to inspect the same before acceptance, and to accept any part less than *the whole of the hops so bargained for,* should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and tendered for acceptance be less than the amount herein bargained and sold; . . ." (Italics ours.)

Thus, the parties contracted with respect to the "entire crop," although the buyer might elect, upon a certain condition, to take less than the entire crop. This condition did not occur (post, pp. vi-viii).

Asserted error No. 2 (Applt's Br. 10-11) to finding that the hops were properly handled. Mr. Oppenheim, president of appellant, testified (G. R. 434):

> "I would say that the curing and drying was okeh; nothing wrong with that."

Mr. Paulus, local representative of appellant, testified (G. R. 357-358) that the hops were in sound condition with respect to drying, curing, baling, handling, and keeping qualities.

Mr. Fry, appellant's field man who negotiated the purchase of the Geschwill hops and examined them for appellant, found that the hops were properly cured, dried and baled. He admitted (G. R. 293, 316) that he had complimented Mr. Geschwill on his nice job of drying.

The testimony of the buyer's witnesses confirms that of Mr. Geschwill (G. R. 133-135, 172-173) and Mr. Sprauer (G. R. 221-224) that the hops were properly cured, dried and baled.

This specification of asserted error seems to be based on counsel's supposition that the parties might possibly have contemplated that Mr. Geschwill would pick the cluster hops burr-by-burr to eliminate the slight touch of mildew. The evidence showed that, before the contract was made, the buyer knew Mr. Geschwill was having the hops picked by machine, and saw his fuggle hops being picked by the machine (G. R. 323, 450). There is no

evidence that the parties considered any different method of picking. The evidence does show, however, that the machine operated to reject a large percentage of any blighted hops as waste matter (G. R. 143, 238, 414-415), so that the hops in the bale actually showed less mildew than they did shortly before harvest when the purchase was contracted.

Further, the testimony is that such burr-by-burr picking was not feasible, if possible at all, and especially not in a yard such as Mr. Geschwill's where the touch of mildew was slight and scattered and not localized (W. R. 302; G. R. 140, 270-271; W. R. 100-101, 124, 128).

Mr. Ray, a witness for the buyers in all three cases, testified that some years ago he had picked selectively a yard which is located outside the United States, and of which he is part owner (W. R. 226-227, 241). As to Oregon yards in 1947, however, even Mr. Ray testified (W. R. 227) that such selective picking was not practical.

Finding "4. In 1947 there was, as defendant knew, wide-spread mildew in hop yards in the Willamette Valley in Oregon. The parties entered into said cluster hop agreement shortly before picking time, and the hops which defendant contracted to buy were then formed and in existence on the vines. *Defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled.*[3] Such mildew in said hops did not become more prevalent or pronounced after said agreement was entered into."

Asserted error No. 3 (Applt's Br. 11, 38) to finding that appellant knew mildew existed and would show in baled hops. Mr. Oppenheim came out to Oregon to inspect the hop yards "when the downy mildew infestation was at its height" (G. R. 426). He found the downy mildew in the Willamette Valley hop yards "was apparent to anybody with eyesight" (S. R. 310). He then gave orders to buy more hops (G. R. 343-344; S. R. 245, 310). After preliminary negotiations by Mr. Paulus, Mr. Fry was authorized to purchase Mr. Geschwill's hops (G. R. 88-90, 343). When Mr. Fry went out to try to buy the cluster hops from Mr. Geschwill he saw the hops on the vine (G. R. 291-292). The slight touch of mildew was then visible upon looking at the hops on the vine (G. R. 96). Not finding Mr. Geschwill at home, Mr. Fry followed Mr. Geschwill into Mt. Angel, bargained with him for several hours, out-bid another buyer, had Mr. Paulus talk to Mr. Geschwill on the telephone, and then followed Mr. Geschwill home at night to sign him up on a sales slip (G. R. 90-96, 152, 291-292, 312, 343). Mr. Fry was most anxious to buy the hops and knew what he was buying.

(Compare uncontested parts of Findings 6 and 11, below, pp. vi, x.)

(As to the custom of buyers to inspect hop crops in the field see G. R. 149, 152-153, 189, 313, 449; S. R. 310, 312.)

The baled hops showed less mildew than the hops on the vine at the time the purchase was contracted, because the picking machine operated to throw out mildewed hops (G. R. 143, 238-239, 414-415); but naturally the harvested hops did show some of the same mildew that the hops in the field had shown (G. R. 143; W. R. 318, 465).

Finding "5. By said agreement defendant contracted to make an advance payment to plaintiff of $4,000 in order to enable plaintiff to defray the necessary expenses of cultivating and picking said hops and of harvesting and curing the same. The agreement provided that defendant would have a prior lien upon said hop crop for such advance payment, and the defendant duly caused said agreement to be filed as a chattel mortgage in the records of Marion County, Oregon."

Asserted error: None.

Finding "6. Said agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defendant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's said crop of cluster hops and that said crop when picked and baled would in normal course show such mildew. Defendant elected to and did make plaintiff said advance. Said mildew in said crop did not thereafter become more pronounced or prevalent."

Asserted error: None.

Finding "7. *Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state*[4] and delivered the same in warehouse at the place and within the time agreed upon in said contract. In

September, 1947, after said hops had been picked, dried, cured and baled as aforesaid, plaintiff, *with the assent of defendant, delivered at Schwab's warehouse in Mt. Angel, Oregon, all of said hops and set same aside for defendant.*[5] Thereafter, defendant inspected, sampled, marked and weighed said hops at that warehouse. The bales of hops constituting said crop were identified, segregated and *appropriated to the contract.*[5] *Plaintiff duly performed all of the terms and conditions of the agreement between the parties on his part to be performed."*[6]

Asserted error No. 4 (Applt's Br. 11) to finding that grower did everything required to put hops in deliverable state. As to proper harvesting, curing and baling, see abstract of evidence above, pp. iii-iv.

Appellant's argument here (Br. 11, 39) is only that the hops showed some mildew and for that reason should not be considered as "prime quality." That was an issue of fact. There is substantial evidence that the hops were "prime quality." So testified Mr. Geschwill (G. R. 134-135, 173 et seq.), Mr. Faulhaber (G. R. 202), and Mr. Sprauer (G. R. 223-224). Mr. Schwind, the only brewmaster who testified, said that these hops were "good hops" such as he would have used in his brewery (G. R. 209-210).

Mr. Oppenheim originally found the hops of "fair quality" (G. Ex. 20; G. R. 438), and on trial testified that if they had been free of mildew "they would have been a good, prime hop" (G. R. 438). Mr. Ray thought that "the quality was not damaged by mildew" (G. R. 481) though he would not have graded

most of the samples as "prime" because of the mildew (G. R. 407). Mr. Franklin, who admitted he "didn't see a Willamette Valley hop in 1947," graded the samples as not prime only because of the evidence of mildew (G. R. 494-495).

See further, abstracts of evidence, below, pp. xv-xx.

Asserted error No. 5 (Applt's Br. 11-12) to finding that grower, with buyer's assent, delivered the hops at warehouse and set them aside for buyer. Mr. Geschwill hauled the hops to Schwab's warehouse, the only bonded warehouse in Mt. Angel, for delivery to the buyer (G. R. 100, 344-345), pursuant to the contract (G. R. 8). The buyer there subsequently inspected, graded, numbered and weighed each bale (G. Ex. 6-A, 6-B; G. R. 109-111, 163, 300, 314, 316). The bales were stamped with, and identified by, the warehouse number, the State inspection number, and the buyer's number (G. R. 316; and see W. R. 307-308). On the pleadings it is admitted that the hops at the warehouse "with the defendant's assent" were made available to defendant for inspection, and that defendant sampled and weighed the hops (G. R. 29). The hops remained in the warehouse under the buyer's chattel mortgage until, after the action was brought, they were sold pursuant to the conditions imposed by the buyer (G. Ex. 28; G. R. 122-132; Finding 13).

Appellant questions this finding (Br. 11-12, 60-61) only upon the legal significance of the word "assent". This legal question is discussed in the main part of our brief.

Asserted error No. 6 (Applt's Br. 12) to finding that appellee duly performed conditions precedent. Appellant's contention here is only that, "if the con-

tract is construed in the manner advocated by the defendant" (Br. 12), the hops did not conform thereto. The substantial evidence supporting the finding that the hops did conform to the contract is referred to above, pp. vii-viii, and below, pp. xv-xx.

Finding "8. Said hops so weighed in by defendant consisted of 130 bales, and had a total net weight, as determined by defendant, of 26,536 pounds. Said hops contained eight per cent leaves and stems and less than three per cent seed content, as determined by an authorized governmental agency in accordance with said agreement."

Asserted error: None.

Finding "9. Said agreement provided that the price to be paid for the hops to be delivered would be the grower's market price for the kind and quality of hops delivered containing eight per cent of leaves and stems and six per cent or more of seeds, and in the event the seed content was less than three per cent then the price would be increased ten cents per pound. Pursuant to said contract on or about September 17, 1947, plaintiff selected the price of 85 cents a pound which was then said grower's market price for such hops containing six per cent or more of seed content, and plaintiff duly notified defendant in writing of such selection. Since the seed content was less than three per cent, the contract price for said hops was 95 cents per pound. The total contract price was $25,209.20."

Asserted error: None.

Finding "10. Upon delivery as aforesaid plaintiff duly tendered said entire crop of hops to defendant in warehouse at the place specified in said agreement, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof except for said partial advance payment. Said hops, as defendant knew, continued to be held by the warehouseman until disposed of as hereinafter stated. Defendant at all times knew it could obtain said hops upon payment of the balance of said purchase price."

Asserted error: None.

Finding "11. On or about October 30, 1947, defendant rejected and refused to pay for said hop crop tendered by plaintiff. On several occasions after said balance became due and owing, plaintiff duly made demand on defendant for the payment thereof. Defendant refused to pay for said hop crop on the particular ground that said hops were blighted and on no other specific ground. *By the term "blighted" it was meant that the hops showed some mildew effect as stated above.*[7] *At the trial defendant advanced the same specific objection to the hops.*[8] *Upon the facts the claimed defect was not material.*[9] Said crop of hops was not any more blighted or mildewed than when defendant contracted to buy the same or when defendant elected to make the advance payment as aforesaid. *Said hops when tendered were merchantable.*"[10]

Asserted error No. 7 (Applt's Br. 12) to finding that "blighted" refers to mildew. Mr. Oppenheim, for example, testified (S. R. 318) that "badly blighted means mildew damage. It is blight from the mildew."

(a) Amount of mildew. Appellant's contention with respect to this finding is only that there was more than "some" mildew effect (Br. 12, 36). There is substantial testimony, from witnesses who knew the whole crop, that there was only a slight touch of mildew (G. R. 77-78, 111, 146, 158, 205, 229). As shown by other findings, such hops as these moved freely in the trade as good, merchantable hops under the same type of contracts (pp. xv-xix).

In this connection, appellant relies (Br. 29-30, 37) upon the testimony of witnesses who saw only old samples (G. R. 486, 495), and particularly upon an unique experiment which appellant had Mr. Hoerner make from such deteriorated samples for the purpose of testifying. Shortly before the trial, and without any notice to appellee (G. R. 320), Mr. Oppenheim had Mr. Paulus (G. R. 339-340) send Mr. Fry (G. R. 317, 375) with a sample, purportedly from these hops, to Mr. Hoerner. Mr. Paulus (G. R. 339-340) and Mr. Fry (G. R. 317-318) each claimed to have selected the sample, and it was purported to be from bale 40 (G. R. 340) which Mr. Ray said (G. R. 482-483) contained the largest quantity of nubbins.

Mr. Hoerner took a sample of less than an ounce (he stated the amount variously as 23.7 and 20.5 grams) to represent the crop of 26,536 pounds (G. R. 378, 385, 38). On appellant's instructions he separated out, not the mildewed nubbins, but all the

hops which showed the slightest microscopic evidence of mildew on any petal, and called them "affected cones" (G. R. 386). By using the full weight of such whole cones he was able to find that 70.1% of the minute sample constituted "infected" material (G. R. 378). At the same time he arrived at a figure of 60.44% on another minute sample (G. R. 380-381, 503). He admitted that, upon the same basis, the vines in the Oregon State College model yard that year ran 97% mildew, with 60 to 70% cone infection (G. R. 368, 387; S. R. 270).

Mr. Paulus and Mr. Hoerner admitted that the experiment was unique and unprecedented (G. R. 340-341, 385; S. R. 272). Mr. Ray and Mr. Oppenheim admitted that such microscopic examinations were never made in the trade (G. R. 451, 489). The experiment was not designed to, and did not, show the actual amount of mildew in the crop. Mr. Oppenheim testified that, to determine whether the value of the hop was impaired, it would be necessary to consider the amount of mildew discoloration on each burr—a trace of mildew on the petals would not impair the value of the hops (S. R. 316, 318-319).

The evidence showed that the buyer was willing to accept hops which were like those used by Mr. Hoerner in his experiment. The buyer found (G. R. 436, 465, 470, 477) that hops like the samples from bale 100, Exhibit 34-K, and bale 130, Exhibit 34-B, were acceptable, and Mr. Hoerner found those samples to be about the same as those he used in his experiment (G. R. 382, 384).

(b) Reason for rejecting hops. Appellant states (Br. 12) ". . . the undisputed evidence establishes that the defendant rejected the plaintiff's hops because of substantial damage by mildew." The evidence is that Mr. Oppenheim had decided to reject the hops before any inspection of the full crop had been made (G. Exs. 48, 17).

He had then seen a few early "type" samples; but as Mr. Haas testified (W. R. 462), "you cannot inspect a lot by simply having one or two type samples." Mr. Oppenheim himself said (S. R. 315), "I would not consider a type sample as representative of the entire lot. That would be a very unfair position to take." (And see G. R. 347.) Mr. Oppenheim had his men in Oregon go through the mere form of an inspection of the full crop. As he explained (G. R. 464), "We have got to go through the form, necessarily, the form of looking at the hops." No one who saw the full crop had any authority to accept the hops in whole or part; instead they had positive instructions not to accept (G. R. 317, 464).

Previously Mr. Oppenheim had found the hops "fair quality" (G. Ex. 20), and subsequently he was willing to accept all the hops which ran like the samples from bales 70, 100 and 130 (G. Exs. 26, 46). Mr. Paulus, Mr. Geschwill and Mr. Faulhaber could not tell any difference between those samples and the others—if they were acceptable the whole lot was acceptable (G. R. 118-120, 183, 201-202, 335, 336, 356, 360).

Mr. Oppenheim said in effect that he decided to reject the hops from his office in New York, before inspection in Oregon, because of mildew. In view

of his prior and subsequent opinions, and in view of the fact that there was no good-faith inspection of the full crop, the Court could properly infer that actually appellant rejected the hops for other reasons, such as that the Oregon crop was not as short as expected and the market would undoubtedly fall off (G. R. 245-247, 265, 453), or that grain restrictions on brewers would curtail their production and thereby reduce the demand for hops (S. R. 323; W. Ex. 3-U), or that the prospect of a lowered tariff on imported hops would affect the market for domestic hops (S. R. 324).

Asserted error No. 8 (Appll's Br. 12-13) to finding that on trial appellant had only the same specific objection. On trial the buyer's witnesses testified that the only ground upon which the samples could be said not to be "prime" was that they showed evidence of mildew. Mr. Oppenheim said (G. R. 438):

> ". . . if they had been entirely free of blight, they would—I would have said they would have been a good, prime hop; they were not as badly blighted or as red as some other hops which I had seen other samples of, Oregon hops."

Mr. Ray judged that the hops had had a good flavor (G. R. 489), and thought that the quality was not damaged by mildew (G. R. 481). Nevertheless, because of the mildew, he would not grade the samples as "prime", except for one sample (G. R. 481-483). Mr. Franklin down-graded the samples only on the basis of mildew (G. R. 493-495).

Hops can show some evidence of mildew and still be taken under "prime quality" contracts, especially if the hops have other redeeming characteristics (W. R. 315-316; G. R. 259). Neither Mr. Ray nor

Mr. Franklin, witnesses who were produced by the buyer as experts on the quality of these hops, had seen them on the vine or in the bale, and they testified only from deteriorated samples seen for the first time in the court room (G. R. 486, 495). The true character of the hops could not be determined from such old samples (G. R. 215-216, 476; S. R. 282-283, 289).

Asserted error No. 9 (Applt's Br. 13) to finding that the claimed defect (mildew) was not material. See abstracts of evidence under Finding 7 (pp. vii-viii), Finding 11 (pp. xi-xiv), and Finding 12 (pp. xviii-xx).

Asserted error No. 10 (Applt's Br. 13) to finding that the hops were merchantable. Appellant (Br. 13) misconstrues "merchantable" to mean "salable at some price". The finding uses "merchantable" in its usual acceptation: "Fit for sale; vendible in market; *of a quality such as will bring the ordinary market price.*" (Black's Law Dict., 3d ed.; italics ours.)

This was a market-price contract. The buyer's printed form contract was qualified by the buyer's mimeographed form rider attached to it, which rider provided (G. Ex. 1; G. R. 8-9): "The price to be paid for the hops to be delivered shall be the Grower's market price for the kind and quality of hops delivered . . ." with a sliding scale for leaf and stem content and a premium for seedless hops such as Mr. Geschwill's.

These hops were of the quality which brought the ordinary market price, i.e., were merchantable (pp. xviii-xix, below). The Grower's market price for fuggle hops, being resistant to mildew, was 90c a pound;

and the Grower's market price for cluster hops, being more susceptible to mildew, was 85 cents a pound. (Uncontested Finding 9, above; S. R. 240, 311; G. R. 156, 360-361.) Even Mr. Ray testified that such was the going market price for good, average-quality cluster hops. He said (W. R. 255):

> "During September buyers were anxious to buy hops selling at 85 cents a pound, 85 cents a pound for prime-quality clusters, Oregon hops, and it was my opinion that 85 cents a pound was paid for cluster hops that were not fully prime in quality, and I would call those good hops."

The hops were raised for the market and were being bought for re-sale to brewers. Their merchantability is the "real question of fact" for determination, as this Court said in affirming the judgment for the grower in *Wolf v. Edmunson,* 240 Fed. 53, 59. While Mr. Oppenheim suggested that the buyer could deliver only "prime hops" to brewers (G. R. 428; S. R. 308), he admitted that hops, though purchased as "prime", were sold simply "as good hops" (G. R. 452). Mr. Oppenheim admitted that on re-sale the appellant might call the hops "choice" or "prime" because there are no fixed standards for those terms (S. R. 309-310) and they are not resold on written specifications (G. R. 452). The only brewmaster who testified was Mr. Schwind who had examined samples of the Geschwill hops when they were fresh. He said (G. R. 209-210):

> "A. When we buy from a grower or dealer, I look for good hops. He can call them what he wants to, prime, choice, or standard. I think I should know a good hop from a poor hop.

Q. In your opinion, were these good hops?

A. Was good, average hops."

The Court properly found that the hops were "merchantable" in that they were of the quality such as brought the ordinary market price, and in that they were "good hops" from the standpoint of a brewer.

Finding "12. *Plaintiff delivered the identical hop crop which defendant contracted to buy.*[11] *Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid.*[12] *Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions.*[13] *Defendant found that a portion of said crop was acceptable, and in fact the entire crop was substantially of the same quality as the part thereof which defendant found acceptable.*[14] *Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said agreement.*"[15]

Asserted error No. 11 (Applt's Br. 13-14) to finding that plaintiff delivered the identical hop crop which defendant contracted to buy. There is no question but that the hop crop from the specified premises was delivered (G. R. 101, 107, 315; and see abstract of evidence under Finding 7, pp. vi-viii,

above). Appellant contends here (Br. 13-14) only that the contract was not for the crop (see abstract of evidence, pp. ii-iii, above), and that the crop was not of good quality (see abstract of evidence, pp. vii-viii, above).

Asserted error No. 12 (Appll's Br. 14, 37-38) to finding that plaintiff did not rely on any warranty. Appellant contracted to buy the hops within two weeks of harvest, and the slight touch of mildew was then apparent and known to the buyer. (G. R. 88-98; and see pp. iv-v, vi, x, above.)

Asserted error No. 13 (Appll's Br. 14-15) to finding that the hops conformed to the quality provisions of the contract as those provisions were actually applied in practice. In former years hops were usually bought and sold on the basis of several grades, and "prime" was an average grade of merchantable hops (G. R. 284; and see *Lachmund v. Lope Sing,* 54 Or. 106, 109-110, 102 Pac. 598, 599). Now there is no other grade, and all grower-dealer contracts, other than spot purchases on samples, speak of "prime quality" (G. R. 283-284, 357, 486). There is no fixed standard for the term "prime" (S. R. 309-310; W. R. 458-459). It is usually understood to mean a good merchantable hop—a hop that moves in the normal channels of trade—an average hop traded in under "prime quality" contracts in that year and locality (G. R. 469, 284, 240-241, 188-189).

Contrary to the prevailing acceptation of the term, however, some of the older buyers' agents, such as Mr. Ray, still attempt to distinguish between "prime hops" and "good, merchantable hops" (G. R. 491; W. R. 224). Mr. Ray thought that a "prime" hop

could not show any mildew, and could not have over 6% leaf and stem content (W. R. 241-242). Nevertheless he admitted that mildewed hops, and hops showing 13% pick, were taken in 1947 under "prime quality" contracts (W. R. 241-242). Some of Mr. Ray's own hops that year were mildewed, showed 12% leaf and stem content, were taken by the hop buyer, and were resold to breweries (W. R. 456-457; W. Ex. 17).

The record abundantly shows that as a general practice hops with a touch of mildew, such as these, and covered by "prime quality" contracts, such as this, were in fact accepted by the hop dealers (W. R. 93, 124-125, 138-139, 152-153, 241-242, 315-316, 329-330, 455-457; W. Ex. 3-W; S. R. 191; G. R. 223-224, 240-241).

Asserted error No. 14 (Appll's Br. 15) to finding that defendant found a portion of the crop acceptable, and that the entire crop was of substantially the same quality. Mr. Oppenheim telegraphed to Mr. Paulus (G. Ex. 26):

> "Received thirteen samples lot 79 Geschwill crop. All samples show many blighted hops but samples of bales 70, 100 and 130 decidedly better than other samples. Willing accept any bales reasonably free of blighted hops and equal to these three samples. Reject balance account not being prime delivery."

Mr. Paulus, on re-examining the samples, found that all the samples showed the same general characteristics throughout (G. R. 360). He found that, while some part of the three samples might show a little more brightness, the slight difference was not

material (G. R. 356). Mr. Geschwill, who looked at the samples with Mr. Paulus, agreed and stated that he could not see any difference in those three bales as compared with the rest of them (G. R. 118-119, 183, 336). Mr. Faulhaber likewise could not see any difference (G. R. 201-203).

At the time he examined the full line of hops at the warehouse Mr. Fry made a complimentary remark to Mr. Fournier and Mr. Geschwill to the effect that the lot was one of the best he had taken in that year (G. R. 110, 161, 195). On trial Mr. Fry did not remember that comment, but talked about how some of the bales showed the slight variation in brightness which Mr. Paulus found immaterial. Opposed to Mr. Fry's testimony are the opinions of Mr. Paulus, Mr. Geschwill and Mr. Faulhaber, referred to above.

When the hops were re-sold, under the conditions imposed by appellant (G. Ex. 28), they were inspected by Mr. Becker and he found that they ran uniform to the type sample (G. R. 287-288).

Asserted error No. 15 (Applt's Br. 15) to finding that upon tender and delivery the hops substantially conformed to the quality provisions of the contract. This finding is clearly supported by the evidence referred to above, pp. vii-viii, xv-xx.

Finding "13. Hops are of a perishable nature; *there had been a material decline in the general market price and demand for 1947 Oregon Cluster hops; and the hops here involved could not readily be resold.*[16] After this action was instituted, and after defendant had been *in default*[17] in the payment of said price an unreasonable time, plaintiff

found that said hops could be resold for a fair price. Said resale was made pursuant to the stipulation between the parties of March 30, 1948. By said stipulation, upon certain conditions imposed by defendant, which conditions were met, defendant did not object to the resale and released the chattel mortgage. Ninety bales were resold on April 1, 1948, for $7,027.13 and the remaining forty bales were resold on April 16, 1948, for $3,090.38, and said prices were the best prices then obtainable for said hops. Of the total sum of $10,117.51 plaintiff received $6,117.51 and $4,000.00 was held under the stipulation by the stakeholder for the account of defendant pending this litigation. Said resale proceeds were properly credited against the sum due plaintiff from defendant, and the then remaining balance was:

Contract	$25,209.20
Advance payment	4,000.00
Amount due plaintiff from defendant on Oct. 31, 1947	$21,209.20
Interest thereon to April 1, 1948, at 6% per annum	528.49
Balance	$21,737.69
Resale proceeds received by plaintiff	3,027.13
	$18,710.56

Interest thereon to April 16, 1948, at 6% per annum	46.00
Balance	$18,756.56
Resale proceeds received by plaintiff	3,090.38
Balance on April 16, 1948	$15,666.18[17]

No part of said balance has been paid."

Asserted error No. 16 (Applt's Br. 15) to findings that the market declined, and that hops could not readily be resold.

(a) Decline in market. Early in the 1947 hop-growing season it appeared that there would be a full crop of Oregon hops and the contract price then offered by the buyers was 45 cents (G. R. 244; S. R. 190-191). In the summer there was unusual mildew in the Oregon yards, brought on by the rainy weather (G. R. 369; W. R. 340-341). It then looked as if there would be a short crop, and the prices offered by the buyers advanced very rapidly up to 65 cents and then to 85 cents, with a 5 cent premium for the less-mildewed fuggles (G. R. 245-246; S. R. 192-193, 240, 311; W. R. 340-341). The yards generally made a second bloom, and the production turned out to be about normal (G. R. 246-247, 274; W. Ex. 14).

The base price was at 85 cents in September (Finding 9). After the bale count for Oregon was known in October, the price was said to remain the same, but there was no active market, the few purchases then made being principally overages on existing contracts (G. R. 246-247, 404-405, 418-420;

W. R. 225). The number of hop brokers to whom growers can sell has become limited in recent years (G. R. 252, 422, 447; S. R. 288; W. R. 460), and the brokers wanted to retain the appearance of that price level as a basis for resales to brewers (G. R. 247). The growers' price for 1947 clusters subsequently declined to as low as 20 cents (G. R. 358), and hops were hard to market because the production had met the brewers' requirements (G. R. 249-251). The hops involved in this case were resold, under stipulation, in April, 1948, for 37½ cents, which was then the fair market price for prime-quality 1947 clusters (G. R. 132, 250, 272-273).

(b) The hops could not readily be resold, according to the testimony, for the following reasons: (1) After appellant had finally determined late in the year not to pay for the hops, the market was very limited. (2) Once a lot of hops has been rejected by one dealer, whether rightly or wrongly, it is difficult to interest another dealer in them. (3) As a matter of practice dealers will not consider hops which, as in this case, are covered by contract and chattel mortgage of another dealer. (4) Appellant's chattel mortgage appeared as a purported lien of record, and appellant would not release the mortgage except upon certain material conditions not authorized by the contract. (Subdivision (a) above; G. R. 122-126, 188, 249-251, 461, 489; G. Ex. 28; W. R. 134.)

Asserted error 17 (Applt's Br. 15-16) to finding that appellant was in default in payment of price, which was due and owing. Appellant's contention here (Br. 15-16) is the same objection to quality considered above, pp. vii-viii, xv-xx.

No. 12440

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,
Appellant,

vs.

FRED GESCHWILL,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

STATEMENT OF CASE

It is said repeatedly in the plaintiff's brief that the only claimed defect of the hops rejected by the defendant was that they had a "touch" of mildew. In fact, the hops were rejected because of substantial and serious damage of the baled hops by reason of mildew (Tr. 433, 434).

The plaintiff relies heavily upon his assertions that the defendant knew of the mildew in the plaintiff's cluster yard at the time the contract was executed and when the harvesting advance was made by the defendant. These are based on Mr. Fry's testimony that he saw the cluster hops on the vines on August 17th when he drove past a part of the yard on his way to the plaintiff's house (Appellee's brief 9). That was at night, after dark, and Mr. Fry did not go into the cluster yard. The plaintiff testified that he did not mention the mildew to Mr. Fry and that he did not know whether anyone connected with the defendant looked at the cluster crop prior to the harvest. The plaintiff did not claim that he ever mentioned the mildew condition to anyone connected with the defendant at any time prior to or at the time of the harvest advance. There is absolutely no evidence that the defendant or anyone acting for it knew that there was any mildew in the plaintiff's cluster yard when the contract was executed or when the advance was made (Tr. 152, 153, 292, 312).

The plaintiff states, page 14, that the defendant decided to go through the "form" of a full inspection, implying that the defendant did not inspect and reject the plaintiff's hops in good faith. Such implication is without foundation in the record. This subject is covered in the defendant's brief, pages 6 to 10.

The plaintiff's statement, page 16, that at the time the inspection was made the defendant's local representatives had been instructed to reject the hops, is misleading. By "inspection" the plaintiff is evidently

referring to the drawing of the tryings and the 10th bale samples and weighing of the bales on October 10th. Previously, on September 25, 1947, the defendant had wired its Oregon representative that three preliminary samples of the plaintiff's hops were of poor quality, full of stems and blighted hops, and were rejected. On the next day the defendant withdrew that instruction and requested its representative to secure 10th bale samples and send them to New York where the defendant itself would make the final decision (Ex. 17, Tr. 84, 86, 442, 472). The following is taken from that letter of September 26:

> "We confirm our instructions to you that you are not to accept any off-grade lots for our account. Where quality is doubtful, whether it is on cheap prices or high priced contracts, we want you to inspect and grade the hops, and send us 10th bale samples representing each grade. The final decision on rejection or acceptance will be made by us after we have examined the samples."

There is no evidence whatever to support the statements in the plaintiff's brief that the market was "very limited," and that the market price was falling or had fallen, at the time the defendant was considering the plaintiff's hops and at the time of the rejection. It is undisputed that throughout 1947 there was a scarcity of prime quality cluster hops, and that the market for such hops remained constant throughout September, October and the greater part of November of that year (Tr. 246, 362, 405, 416, 440, 446, 475, 476, Ex. 33, Tr. 285).

The defendant did not contract for plaintiff's hops

as a market speculation. Its contract purchases from growers were covered by its contract sales to brewers, so that hops it rejected had to be replaced by spot purchases in order to fill its brewer commitments (Tr. 440, 437, 453).

For clarity, the discussion herein of plaintiff's argument is grouped under the appropriate numbered headings of our original brief.

I

The plaintiff argues that mildew is not a form of mold within the contract requirement that the hops shall be free of mold. It is uncontradicted, however, that mildew is a form of mold (Tr. 366, 370).

Plaintiff's contention, page 23, that there is substantial evidence that these hops were of prime quality and met each of the descriptive phrases in the contract, is based upon plaintiff's statement, in answer to his counsel's leading question, that his hops were of prime quality. The plaintiff acknowledged on cross-examination, however, that what he meant by prime quality was average quality for the year in the Willamette Valley, and that he judged each factor of quality on that same "average" basis. He admitted that his hops were infected by mildew to the extent of 5% of his crop (Tr. 144, 176, 178, 179). The plaintiff's witnesses on the quality of his hops also based their opinions on this "average" standard or simply testified that the hops were "good hops" (Tr. 209, 223, 240, 276). His witness,

Walker, testified these hops were "good, merchantable" but not prime quality (Tr. 276).

Plaintiff's criticism of the testimony based on examination of the samples of his hops is not tenable. It is no answer to this testimony to say that it was not based on examination of the hops on the vines. Baled hops are judged in the trade entirely by such samples. The condition of the hops on the vines is wholly immaterial, as the defendant's contract was for hops fully processed and in bales, not hops growing on the vines. Mildew damage appearing in samples of baled hops is readily apparent. It is complete when the hops are baled and cannot thereafter increase in such samples no matter how old and "deteriorated" the samples may be (Tr. 366-368, 476). There is no evidence, and the plaintiff has not contended, that the hop samples introduced in evidence by the defendant and examined in court by the expert witnesses were not representative of the bales from which they were drawn.

The trial court's refusal to find that the plaintiff's hops were of prime quality, and its finding simply that the hops were merchantable, forces the plaintiff into the untenable position of contending that "merchantable" hops meet the express requirements of the contract. The gist of the plaintiff's argument is that if the hops were merchantable at some price, the defendant was bound to accept them as prime quality and to pay the market price of prime quality. This amounts to saying that a contract buyer of Grade No. 1 of a commodity must accept the seller's tender of Grade No. 3, and pay the

No. 1 price, simply because there is a market for No. 3 grade at some price.

The plaintiff's definition of "merchantable" as meaning "of a quality such as will bring the ordinary market price" (XV of Appendix) shows the extremity of his position. The record shows that hops of various types and qualities are sold at different prices. Some brewers will buy low quality hops at bargain prices. There is no evidence, however, that the plaintiff's cluster hops could have been sold for the "ordinary market price" which prevailed for prime quality hops when these hops were rejected. In fact the plaintiff himself admitted that after the hops were rejected by the defendant he offered them unsuccessfully for 5¢ per pound under the prime quality market price. Thus the plaintiff's hops did not qualify even under his own definition of merchantable (Tr. 185, 446). Furthermore, only literal compliance with the contract description and warranty is sufficient to justify a recovery of the price, irrespective of whether or not the product tendered is "merchantable." The plaintiff's statement, page 30, that his hops were "equal to the average actually accepted in the trade that year under prime quality contracts," is not supported by the record. There is no evidence as to what was the average quality hop in 1947, or the average which was accepted under prime quality contracts, or as to the quality of hops accepted under prime quality contracts and for which prime quality prices were paid.

Acceptance of hops which had been covered by prime quality contracts but were taken by the buyers at prices

considerably less than the prime quality contract price, is of no avail to the plaintiff here, as he seeks to recover the prime quality contract price for a product which he admits did not meet the quality specifications of the contract.

There is no evidence whatever to support the plaintiff's statement, page 34, that "these were such hops as were actually accepted in the trade as prime quality." The evidence that mildew-damaged hops were taken in under prime quality contracts means nothing in the absence of evidence that the buyer paid the prime quality price for those hops. Furthermore, collateral transactions, and what other buyers may have done, cannot bind this defendant.

The plaintiff attempted to show that his hops were of average quality for the year. We believe we have established in our brief that "prime quality" cannot by any stretch of the imagination be construed to mean "average quality," and that, in fact, the application of such a standard in judging hops would be wholly impracticable and an absurdity. That argument has not been answered by the plaintiff.

II

The plaintiff's argument that the defendant did not rely on the plaintiff's warranty of the quality and condition of his hops, is based entirely on the premise that the defendant knew when it executed the contract that the hops were mildewed. As heretofore pointed out,

there is no evidence whatever that the defendant knew at that time of any mildew in the plaintiff's hops.

Furthermore, it is well settled that the execution of a contract containing a warranty by the other party constitutes a reliance upon that warranty. 4 *Williston on Contracts,* Section 972.

Finally, it is not necessary to base the defendant's case upon breach of warranty. The plaintiff agreed to sell hops of a certain description. The hops tendered did not meet that description.

The plaintiff has admitted that the hops tendered did not meet the express contract requirements. He is thus forced to fall back upon what he contends was a "substantial performance" of the contract. We submit that the record shows clearly there was no such performance. However, as set forth in heading II of our original brief, the authorities establish that substantial conformity to the contract description of the goods is not sufficient to meet the contract requirements. Actual conformity is essential for recovery of the price.

The doctrine of substantial performance has been applied almost exclusively in cases involving construction contracts. From the beginning it was acknowledged to be a departure from the fundamental principles of contract law and was invoked to avoid the harsh consequences of the strict application of contract principles in cases in which the builder failed to complete the contract in a small number of minor details. Even in such cases, the builder is compelled to ask that his nonperformance be excused, and to present evidence of the

cost of the performance with respect to which he is in default, in order that the contract price may be reduced by that amount.

Here we have an action for the entire contract price of goods concededly of inferior quality and the effect of the judgment is that the defendant is required to pay the contract price for inferior goods.

The plaintiff contends that the hops delivered by him to the warehouse were "good merchantable" hops. While the trial court found that such hops were "merchantable," not "good merchantable," that is far from a finding that the hops delivered to the warehouse conformed to the contract description. The expression "merchantable" and "good merchantable" do not appear in the description in the contract, nor is there any evidence in this record that hops which are "merchantable" or "good merchantable" meet the contract description.

There is not the slightest evidence in this case, furthermore, that the term "merchantable" or "good merchantable" has any trade meaning or any certain meaning whatever. The word "merchantable" actually means "salable" but hops which are merely salable at some price certainly do not meet the standards of quality set forth in this contract in definite terms.

In *Wolf v. Edmunson,* 240 Fed. 53, in referring to merchantability, the court simply told the jury that they were to consider the value of the hops in the market rather than their chemical content or inherent value, inasmuch as the contract was made with the market value in view.

There are several answers to the plaintiff's contention that the defendant waived the contract description or warranty and is estopped to rely upon it (Appellee's brief 36, 37, 40-45).

The judgment in this case is based solely on the plaintiff's performance of his contract. The findings of fact and conclusions of law make no mention of either waiver or estoppel. The plaintiff therefore cannot now support this judgment on the ground of waiver or estoppel. *McMillan v. Montgomery*. 121 Or. 28, 253 Pac. 879.

Finding of fact No. 6, relied upon by the plaintiff as a finding of waiver, cannot be so construed without being directly inconsistent with the express findings of fact and conclusion of law that there was complete performance by the plaintiff. These findings and conclusion that the plaintiff fully performed, amount in effect to a finding that there was no waiver. Such inconsistency would itself require a reversal of the judgment.

> *United States v. Jefferson Electric Mfg. Co.,* 291 U.S. 386, 78 L. Ed. 859, 54 S. Ct. 443.
> *Winnett v. Helvering,* 68 Fed. 2d 614 (C.C.A. 9).

Waiver or estoppel cannot arise out of the execution of the contract for the reason that the defendant had no knowledge at that time that there was any mildew in the plaintiff's yard.

Waiver or estoppel cannot arise out of the making of the harvesting advance to the plaintiff for the reason that there is nothing in this record to establish that at the time the advance was made, several days before harvest was

commenced, the defendant had knowledge of any mildew in the plaintiff's yard. The finding that at the time of picking the defendant had such knowledge is, of course, immaterial as the picking was not commenced until several days after the advance was made.

A waiver is an intentional relinquishment of a known, existing right. *Dickerson v. Murfield,* 173 Or. 662, 147 Pac. 2d 194.

An intention to waive a right can be established only by clear, convincing, and unambiguous evidence. The intention must be free from doubt. *Bankers Trust Co. v. Economy Coal Co.,* 224 Ia. 36, 276 N.W. 16.

There can be no implied intention to waive a right, that is, one based on conduct or omissions, unless such conduct or omissions are inconsistent with an intention to insist upon such right. *Mundt v. Mallon,* 106 Mont. 242, 76 Pac. 2d 326. *Concrete Engineering Co. v. Grande Building Co.,* 230 Mo. App. 433, 86 S.W. 2d 595.

A waiver is a voluntary act which implies a choice by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted upon. Voluntary choice is the very essence of waiver; acts done under the compulsion of a contract cannot form the basis for a waiver. *Industrial Work v. Mitchell,* 114 Mich. 29, 72 N.W. 25.

A waiver cannot be given effect unless it is supported by consideration, or unless the conduct or omissions on which it is based are such as to give rise to an estoppel. *Craswell v. Biggs,* 160 Or. 547, 86 Pac. 2d 71.

To constitute an estoppel, there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it. *Marshall v. Wilson,* 175 Or. 506, 154 Pac. 2d 547.

An estoppel may be established only by clear, precise, and unequivocal evidence. *Spence v. Washington National Insurance Co.,* 320 Ill. App. 149, 50 N.E. 2d 128. It cannot rest upon conjecture or inference. *Augusta Trust Co. v. Augusta H. & G. R. Co.,* 134 Me. 314, 187 Atl. 1.

The equity must be strong and the proof clear to deprive a party, by means of an estoppel, of his right to rely upon the truth. *Craswell v. Biggs,* 160 Or. 547, 86 Pac. 2d 71.

There can be no estoppel unless it is shown that the representations of the one sought to be estopped were relied upon by the other party to his detriment. *Marshall v. Wilson,* 175 Or. 506, 154 Pac. 2d 547.

The defendant respectfully contends that the application of these principles precludes a decision that there was a waiver in this case or that an estoppel arose out of either the execution of the contract or the making of the advance.

IV

Section 63(3) of the Uniform Sales Act

The plaintiff's contention, page 62, that the defendant's knowledge that the hops were warehoused and obtainable on payment of the price amounted to the notice required by the statute, is contrary to the plain weight of authority.

Lannom Mfg. Co. v. Strauss Co., 235 Ia. 97, 15 N.W. 2d 899, cited by the plaintiff, was an action for the price of shoes. Defendant cancelled his order after plaintiff had started their manufacture. Plaintiff shipped the shoes, defendant refused to accept, and the carrier then notified the plaintiff, who declined to have anything to do with them. The carrier placed the shoes in storage where they remained to the time of trial. The only discussion of notice in the court's opinion is in these words:

> "Plaintiff has attempted to deliver the goods to defendant and has treated them as belonging to defendant. This was the equivalent of offering to deliver the goods and notifying the defendant that they were held for defendant. *Pratt Chuck Co. v. Crescent Wire and Cable Co.*, 33 Fed. 2d 269."

This conclusion by the Iowa court is clearly unsound. The mere fact that the seller in that case treated the goods as belonging to the buyer actually was no indication that the seller thereby had notified the buyer that the goods were thereafter held by the seller as bailee for the buyer.

The *Pratt Chuck Co.* case does not support that

statement. In that case the defendant buyer retained possession of the machine and although offering to return it to the plaintiff, never did so.

The cases cited in the defendant's brief, page 47, establish that the giving of the notice specified in Section 63(3) of the Act is a condition precedent to the right of the seller to sue for the price under that section. That is supported by the following additional decisions:

Dodd v. Stewart, ...Pa....., 120 Atl. 121.

G. Robison & Co. v. Kram, 195 App. Div. 873, 187 N.Y.S. 628.

Henderson Importing Co., Inc. v. Breidbart, 182 N.Y.S. 169 (S. Ct., App. Term).

Mindlin v. Freydberg, 171 N.Y.S. 250 (S. Ct., App. Term).

Several of these decisions are of particular importance for the reason that, at the time of the buyer's repudiation of the contract, the property was held by a bailee. In *Dodd v. Stewart,* supra, the boat which was the subject of the contract of sale, was in a shipyard. In *Western Hat & Mfg. Co. v. Berkner Bros., Inc.,* 172 Minn. 4, 214 N.W. 75, cited in the defendant's brief, page 47, the goods apparently were held by a carrier.

It is apparent, therefore, that the overwhelming weight of authority requires the actual giving of the notice as a condition precedent to the right of the buyer to maintain an action for the price.

There is not a scintilla of evidence in this case that the plaintiff notified the defendant that he or anyone else would hold the hops as bailee for the defendant,

nor is there any finding of fact by the trial court that such notice was given.

Section 63(1) of the Uniform Sales Act

1. The plaintiff's argument, pages 53 to 57, fails to consider the issue actually before the court: The effect of the contract upon the passing of title.

Livesley v. Johnston, 45 Or. 30, 76 Pac. 13, 946, is not contrary to the defendant's position. That was a suit for specific performance of a contract to sell hops, brought by the buyer against the seller. Not one word of the contract as quoted in the opinion relates to the passing of title, and the court did not consider the question whether title had passed.

Lehman v. Salzgeber, 124 Fed. 479 (Cir. Ct., Dist. of Ore.), likewise obviously is not applicable here.

The plaintiff completely disregards the fact that these parties have agreed when title to these hops would pass. They were entirely within their rights in so agreeing and no reason has been shown why their agreement should not be honored. The authorities cited under heading VI of our original brief establish clearly that this agreement must be given effect even though the result is to preclude an action by the plaintiff for the price.

2. The plaintiff contends that this was not a cash sale because the plaintiff did not insist upon immediate payment but allowed the defendant additional time to consider the quality of the hops.

There was no obligation on the part of the defendant to pay for the hops when they were weighed. That obligation arose, according to the terms of the contract, upon delivery of the hops by the plaintiff to the defendant and acceptance of them by the defendant.

The plaintiff agreed in writing that the weighing of the hops by the defendant would not constitute an acceptance. It follows that there was no obligation on the part of the defendant to pay for these hops when they were weighed.

There was no extension of the time of payment. The contract provision with respect to payment remained in effect. The only extension related to the time when the hops might be accepted or rejected by the defendant.

Johnson v. Iankovetz, 57 Or. 24, 102 Pac. 799, 110 Pac. 398, is no authority for the position assumed by the plaintiff.

3. The plaintiff apparently has no serious quarrel with our argument under this subheading.

The plaintiff does contend, however, that Section 71-119, Rules 2 and 5, apply to this situation as well as Rule 4 of that Section. Plaintiff evidently is contending that Rule 2 is applicable for the reason that the hops, at the time the contract of sale was entered into, were "specific" goods.

It is respectfully submitted that not one of the cases cited by the plaintiff meets the situation before this court.

Pittenger Equipment Co. v. Timber Structures, Inc.,

50 Or. Adv. 625, 217 Pac. 2d 770, was a suit for specific performance of defendant's contract to deliver lumber to the plaintiff. The court, in reliance upon Section 68 of the Uniform Sales Act, Section 71-168 O.C.L.A., which provides that where the seller has broken a contract to deliver "specific or ascertained goods" a court may if it thinks fit, on the application of the buyer, direct that the contract be specifically performed, said that the lumber described in the contract constituted "specific and ascertained goods" and then decided that specific performance should be granted.

That case is not an authority in support of the plaintiff's contention, however, as there is nothing in the opinion nor in the transcript itself which in any way establishes that the lumber covered by the contract was not fully cut and piled awaiting delivery at the time the contract was made.

Other cases, relating to products of the soil, are cited by the plaintiff. All are distinguishable, however, including the *Pittenger Equipment Co.* case, on this ground in addition to various others: In not one of the cases cited did it appear that it was incumbent upon the seller to remove defective portions of the goods before processing them. Here, the contract covered hops which had yet to be harvested, dried, cured and baled, and required that such hops be of prime quality and otherwise meet the description in the contract. This excluded hops then or thereafter affected by mildew. Prior to the baling of such hops, it is certain that the hops complying with the description in the contract were neither specific nor ascertained. It must also be clear

that it was impossible at the time the contract was entered into for either the plaintiff or the defendant to determine which hops, when harvested, dried, cured and baled, would meet the contract specifications.

The plaintiff evidently considers that Rule 5, Section 19, applies to this case and that as a result title to the hops passed to the defendant upon their delivery to the warehouse. Rule 5, of course, must be read in conjunction with Rule 4(1) and the cases cited under subheading 3 of heading IV in the defendant's brief. By virtue of Section 47 of the Act, Section 71-147 O.C.L.A., the defendant had the right to inspect these hops whether they were specific goods at the time the contract was entered into or were unascertained at that time. This right of inspection was confirmed by the agreement signed by the plaintiff and the defendant when the hops were weighed at the warehouse. Consequently, the cases cited under this subheading in the defendant's original brief establish that any title which passed to the defendant upon the delivery of the hops to the warehouse was conditional and was subject to being defeated by the justifiable rejection of the hops by the defendant. The plaintiff has expressed no criticism of the decisions which support that proposition.

The plaintiff has cited two cases with extensive quotations in general language in an attempt to establish that this action for the price is justified.

Daniels v. Morris, 65 Or. 289, 130 Pac. 397, 132 Pac. 958, arose prior to the enactment of the Uniform Sales Act in Oregon.

The same is true of *Pabst Brewing Co. v. E. Clemens Horst Co.,* 229 Fed. 913 (C.C.A. 9), which arose in California prior to the adoption of the Uniform Sales Act in that state and prior to the decision of *Tomkins v. Erie Railroad Co.,* 304 U.S. 64, 58 S. Ct. 817.

These cases thus do not establish, nor do any others cited by the plaintiff, that this plaintiff may maintain this action for the price without fulfilling the exact requirements of the Uniform Sales Act.

VI

The plaintiff does not criticise the cases cited in the defendant's brief under this heading, but merely comments on *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958. His argument that the "liquidated damages" provision of the contract does not provide an exclusive remedy, runs directly counter to the express contract provision that the difference between the contract price and the market value of the hops "is hereby agreed to be the measure of damages," and "the said difference between the said contract price and the market value * * * is hereby agreed and fixed and determined as liquidated damages." Analysis of this contract clause shows that the recovery of damages is intended as the only remedy available to the plaintiff. In other words, these parties expressly agreed that under no circumstances should the plaintiff be entitled to recover the price of the hops.

The plaintiff's contention that the measure of dam-

ages specified in this clause cannot be the exclusive remedy because there was no open market at the time and place of delivery of the hops to the warehouse, is completely refuted by the undisputed fact that the market price of 85¢ per pound for late cluster hops which the plaintiff selected in September, prevailed throughout October and until nearly the end of November. It follows that if the plaintiff's hops had been of prime quality, he could have sold them readily at that price to someone other than the defendant.

It is respectfully submitted that the decisions cited in the plaintiff's brief applicable to this heading are not in point, and that *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958, does support the defendant's position.

CONCLUSION

The defendant respectfully prays that the judgment be reversed and that a judgment be entered on its counterclaim in favor of the defendant and against the plaintiff for $4,000.

Respectfully submitted,

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.

No. 12,440

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,
Appellant,

v.

FRED GESCHWILL,
Appellee.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Appeal from the United States District Court for the District of Oregon.

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND 2-51

SUBJECT INDEX

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STATUTES
IN
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No. 12,440

United States
COURT OF APPEALS
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HUGO V. LOEWI, INC., a Corporation,
Appellant,

v.

FRED GESCHWILL,
Appellee.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon.

TO THE HONORABLE, THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Comes now Hugo V. Loewi, Inc., a corporation, and respectfully petitions this honorable court for a rehearing in accordance with the rules and practice of this court, on the following grounds:

I. The court erred in deciding that the hops tendered by the appellee were of the quality called for by the contract.

II. The court erred in refusing to apply the measure of damages specified in the contract.

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I, Stuart W. Hill, one of the attorneys of record for the appellant on this appeal, hereby certify that in my opinion the petition for rehearing is well founded and that it is not interposed for delay.

STUART W. HILL,
One of the Attorneys for Appellant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ARGUMENT

I.
ISSUE ON QUALITY

The court erred in deciding that the hops tendered by the appellee were of the quality called for by the contract.

The court concluded that the hops tendered did conform to the quality called for by the agreement, for these reasons:

1.

> "The proposition that 'prime quality' has no definite meaning has been advanced by the Oregon Court."

In support of that statement the court quoted at length from *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958, in which it is stated that it is a matter of opinion whether a particular quantity of hops is or is not of prime quality, and that opinions differ. That is true, but in the present case the court completely disregarded two later Oregon cases which plainly establish that the term "prime quality" in this contract must be construed to mean exactly what the rest of the warranty specifies.

These two cases are cited and discussed on pages 23 and 24 of the appellant's brief.

The first is *Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636. In its opinion in that case the court said:

> "Therefore the contract under consideration defined the hops to be produced in terms which must be taken as the yardstick by which to measure their quality."

The second is *Wigan v. LaFollett,* 84 Or. 488, 165 Pac. 579, in which the following instruction was approved:

> "You are to accept the definition of prime quality as laid down in this contract by the parties themselves."

It is therefore established by the law of Oregon that the term "prime quality" must be interpreted to mean exactly what the other terms in the warranty specify.

In order to determine whether there is any evidence tending to establish that the hops tendered by the appellee met the quality provisions of the contract, it must be recalled that the appellee has taken the position from the commencement of this litigation that "prime quality" hops were those of average quality for the year in which grown. The evidence introduced by the appellee simply tended to support its contention that prime quality hops are average hops and that the appellee's hops were of average quality. On the other hand, the evidence introduced by the appellant tended to establish that the appellee's hops were not of prime quality as that term is defined in the contract.

Consequently, no square issue of fact was ever presented on the quality of these hops. The appellee's evi-

dence simply tended to establish that the hops were of average quality, whereas the appellant's evidence tended to establish that they were not of the quality specified in the contract.

Inasmuch as the law of this State, exemplified by the two cases last cited, declares that this contract must be construed in the manner advocated by the appellant, it follows that there is no evidence whatever in this case that the appellee's hops were of prime quality.

It must also be recalled that the court expressly refused to make a finding that the appellee's hops were of prime quality when tendered. The court did this by striking from the proposed findings of fact submitted by the appellee, a finding that the hops were of prime quality, and by inserting in its place a finding that the hops were "merchantable."

2.

> "We are of the opinion that the finding by the trial court that the mildew damage or blight was not material is supported by substantial evidence."

In answering this statement it is necessary to emphasize that the trial court refused to find that the hops tendered were of prime quality, that is, that they met the standards of quality specified in the contract, and found instead that the hops tendered were simply "merchantable."

It is well established, however, that hops or any other goods which are simply "merchantable" need not be accepted and paid for by the one to whom they are

tendered in performance of a contract calling for hops or goods of a particular quality, but may be rejected on the ground that they do not conform to the quality provisions of the contract.

Many cases establishing the proposition that unless goods are of the quality described in the contract, the buyer is not bound to accept them and can refuse to receive them, are cited in the appellant's brief, pages 41 to 45. Several of these cases establish that a buyer has a right to performance of the contract of sale in accordance with its terms and that it is no excuse to the seller that some other performance should be just as satisfactory or serviceable. In *Peck v. Hixon,* 47 Idaho 675, 277 Pac. 1112, discussed on pages 44 and 45 of the appellant's brief, the court made this statement:

> "It was not sufficient that those not of the quality stipulated were in fact merchantable. Respondents (buyers) were required to take only 'white-faced and Durham' steers."

If the condition of hops or other goods is such that they do not meet contract requirements but are simply merchantable, and they may accordingly be rejected by the buyer, it is very clear that the condition which prevents the hops or goods from meeting such contract requirements is decidedly material.

It follows that the finding that the mildew damage or blight was not material is inconsistent with the action of the court in finding that the hops were "merchantable" but not of "prime quality," and is contrary to law.

II.

LIQUIDATED DAMAGES

The court erred in refusing to apply the measure of damages specified in the contract.

The court recognized in its opinion that parties to a sales contract may specify that a certain measure of recovery shall be adopted in the event of a breach.

The court stated, however, that the measure of recovery which these parties adopted by their solemn acts cannot be applied for these reasons:

1.

> "There is nothing in the facts to indicate that it would be difficult to determine the damages of appellee by the normal rule of damages."

The court had stated previously the rule applied by it in these words, citing *Hull v. Angus,* 60 Or. 95, 118 Pac. 284:

> "Such agreements have been enforced where the parties have attempted to arrive at a reasonable measure of damages in a field where damages would be very uncertain and difficult to determine."

It is clear from a reading of the opinion in that case that the court did not state or apply a rule in the language of the Court of Appeals. In fact, the court sustained and applied the agreement for liquidated damages which had been made by the parties, on the ground that they could not foretell the damages when the con-

tract was made. Difficulty in proving damages at the trial had nothing to do with the decision.

Furthermore, the court was dealing with a liquidated damages clause pure and simple, which provided for a recovery wholly at variance with any established measure of damages. In this Geschwill case we are concerned only with a clause which adopts one of the statutory measures of recovery and precludes use of another.

If there is a rule of the sort stated by the Court of Appeals, it certainly has no application to this case. A rule of that kind could only have a basis for its existence when the parties were attempting to substitute for a tested and accepted measure of damages, one which might or might not be fair and reasonable. Here in this Geschwill case, the parties chose to follow one of the statutory methods of compensation and to exclude the other. These parties were not adopting a wholly untried method in place of one which has been tested for centuries.

Consequently, the rule stated by the Court of Appeals and its conclusion with respect thereto, are without materiality or significance.

The cases relied upon by the appellant in its original brief, pages 64 to 68, establish that the difficulty of ascertaining damages has nothing whatever to do with the sort of contract clause we are considering: one in which one statutory measure of damages is adopted and another excluded.

2.

> "The effect of the clause is to limit recovery to one particular method (based on market value) which, under the facts, would make it more difficult to determine damages."

Without citing any authority, the court gives this explanation for the statement just quoted:

> "We are aware of no reason why we should thus limit the method of recovery of damages where more definite and reasonable criteria are available."

We will consider first the word "definite" in that statement, and then the word "reasonable."

With respect to the word "definite," this portion of the court's opinion is, without justification, directly contrary to the actual decision of the court in two cases cited in the appellant's original brief, page 68.

It is there said:

> "If this contract provision is regarded as one authorizing the recovery of liquidated damages, it is unimportant that the measure of damages specified is as indefinite as the corresponding statutory measure of damages.
>
> "*Sheffield-King Milling Co. v. Domestic Science Baking Co.,* 95 Oh. St. 180, 115 N.E. 1014.
>
> "*International Milling Co. v. North Platte Flour Mills,* 119 Neb. 325, 229 N.W. 22."

In each of those cases based upon the Uniform Sales Act, the court sustained and applied complicated contract provisions to the exclusion of the simple statutory measure of damages. In each the contract called for

the purchase of wheat, milling it into flour, and sale of the flour. In each, furthermore, the contract specified that the damages should be computed in a particular manner based upon the price of wheat rather than of flour, and in each the necessary computation was much more complicated than if the statutory method had been used. In the *International Milling Co.* case, the court said that the contract measure of recovery was just as indefinite as the statutory measure of damages and was far more complicated.

Furthermore, the court is not justified in refusing to adopt a contract measure of recovery which is definite enough to have been used by the courts for centuries, simply on the ground that some other measure of damages excluded by the contract of the parties, may, in this case, appear easier of application by the court or the appellee's attorneys.

Turning now to the word "reasonable" in the quoted language, the same comment may be made. The court cannot justifiably refuse to adopt a contract measure of recovery which is reasonable enough to have been used by the courts for centuries, simply on the ground that some other measure of damages excluded by the contract of the parties, may, in this case, appear more reasonable.

The propositions stated in the two preceding paragraphs are supported by the two milling company cases and by the fundamental rule of the law of contracts that it is the function of the courts to interpret and enforce contracts as written and not to make new contracts for the parties.

A court is not authorized to make contracts for parties, or to alter or amend those which the parties have made.

Section 2-216, O.C.L.A., provides the general rule for the construction of instruments by the courts:

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all."

In *Scheuerman v. Mathison,* 74 Or. 40, 144 Pac. 1177, the rule is stated in these words:

> "Neither courts of law nor of equity have the right or power to make contracts for parties, or to alter or amend those that the parties have made. It is the intention of the parties, manifested by their words, and not the whim of the court, that must guide in construing contracts made by the parties thereto. In some instances, parties without exercising due caution, sign contracts that are not in all respects reasonable or fair; but when they execute such contracts, they are, in the absence of fraud, bound by them."

Salem King's Products Co. v. Ramp, 100 Or. 329, 196 Pac. 401.

Blessing v. Ocean Accident and Guarantee Corporation, 152 Or. 632, 54 Pac. 2d 300.

3.

"It would be unconscionable to restrict appellee to a measure of damages based on market value

where under the situation he faced due to this rejection he could not dispose of the hops without appellant's consent which came only after he had been compelled to bring suit."

The basis for this statement is that the contract was recorded as a chattel mortgage after rejection and that the appellant's consent was necessary to permit the sale of the hops to a third person.

The answer to the court's statement is readily made: The appellee did not ask for consent to sell to anyone else, until after suit was started. When he did ask, the consent was given at once. The appellant advanced a substantial sum to the appellee and naturally wanted the money repaid. Repayment would certainly be expedited more by giving the consent than withholding it and preventing a sale of the hops. No motive has been shown in the evidence for withholding the consent and the circumstances plainly declare that the consent would have been given at any time a request was made.

4.

"The measure of damages set out by the contract is not the exclusive remedy available to the seller."

This language was used by the parties:

" * * * the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is

hereby agreed and fixed and determined as liquidated damages."

This clause, considered alone, is subject to only one interpretation: the measure of damages therein set forth was to be applied to the exclusion of every other measure of recovery.

This is established by the following cases cited in the appellant's original brief, pages 64 to 68.

In *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958, the contract clause provided:

> " * * * the seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the buyers, the difference between the contract price of said hops, as herein specified, and the market value of the kind and quality in this contract mentioned * * *."

The court held that the seller was limited to the measure of recovery so specified.

In *International Milling Co. v. North Platte Flour Mills,* supra, the opening clause of the damage provision was as follows:

> " * * * seller shall recover from buyer liquidated damages as follows: * * *."

Here again the court applied the contract measure of recovery.

In the light of these authorities, the contract clause in this Geschwill case, standing alone, clearly does provide that the measure of recovery stipulated therein shall be the exclusive remedy of the seller named therein, the appellee.

5.

> "In short, where, as here, there was no available market for the goods in question and such a market was obviously contemplated by the parties by the terms of the damage clause, the clause did not stand as a bar to the measure and theory of damages here adopted by the trial court which worked out substantial justice between the parties."

It will be assumed under this heading that the court meant that the contract damage provision cannot be regarded as furnishing the only measure of recovery in this case for the reason that the market value of the hops had to be taken into account in determining damages under that provision and "there was no available market for the goods in question."

There is no evidence whatever in this case from which any inference can be drawn, even the weakest, that "there was no available market for the goods in question." The only evidence in this case bearing on the state of the market, points to the opposite conclusion: The market remained firm for about a month after the appellant rejected the appellee's hops. The price then began to decline. It is undisputed that there was a good market for prime quality hops throughout 1947, and that the market price did not begin to fall until the latter part of November of that year. The court is referred to pages 36 and 37 of the appellant's brief for citations to the transcript.

For two months, therefore, after the rejection, there was a good market for the appellee's hops if they were of prime quality.

The trial court made this finding in paragraph 13 (Tr. 40):

> "There had been (presumably prior to the rejection of the appellee's hops on October 30, 1947) a material decline in the general market price and demand for 1947 Oregon cluster hops."

The appellant contended in its original brief, page 36, that there was no evidence to support that finding, using these words:

No evidence whatever was introduced in support of that finding. The market price of hops did not decline prior to the latter part of November, 1947. Mr. R. M. Walker, who was produced as a witness by the appellee, acknowledged that the market price of prime hops remained at 85¢ and 90¢ until the end of November, 1947 (Tr. 246). Mr. Ray and other witnesses testified that there was a scarcity of prime quality hops in 1947 and that there was a good market for them throughout 1947 (Tr. 362, 405, 470, 475, 476), and that the market price for hops of the type then available began to decline during the latter part of November (Tr. 246, 247; Exhibit 33, Tr. 285).

The only portions of the testimony to which the appellee directed the court's attention on this question (Brief xxii and xxiii) support the contentions of the appellant with respect to this finding. The evidence establishes that the inactivity of the market in December 1947 was due to the scarcity of prime quality hops offered for sale (Tr. 405; Wellman Tr. 225). There is nothing in this record beyond pure speculation, that the

inactivity in the market during December 1947 was due to any other cause.

CONCLUSION

The appellant respectfully contends that there is clear error in the decision of the court in the two respects discussed herein and requests a rehearing in order that this may be demonstrated beyond doubt.

Respectfully submitted,

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.

No. 12446

United States
Court of Appeals
for the Ninth Circuit.

H. W. SMITH, doing business as A-1 Photo Service,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record

Petition For Review of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

EUGENE M. PURVER, ESQ.,
For the General Counsel.

ALEXANDER H. SCHULLMAN, ESQ.,
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MORRIS J. POLLACK, ESQ.,
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GIBSON, DUNN AND CRUTCHER,
By JOHN BINKLEY, ESQ.,
Los Angeles, Calif.,
For the Employer.

United States of America Before the National Labor Relations Board, Division of Trial Examiners, Washington, D. C.

Case No. 21-CB-34

In the Matter of:

LOCAL 905 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION (AFL), HASKELL TIDWELL, SECRETARY-TREASURER, AND ALBERT E. MORGAN, BUSINESS AGENT

and

H. W. SMITH, d/b/a A-1 PHOTO SERVICE.

INTERMEDIATE REPORT

Statement of the Case

Upon an amended charge dated April 5, 1948, filed by H. W. Smith, doing business as A-1 Photo Service, San Pedro, California, herein called the Employer, the General Counsel of the National Labor Relations Board,[1] by the acting Regional Director for the Twenty-first Region (Los Angeles, California), issued a complaint dated April 7, 1948, against Local 905 of the Retail Clerks International Association (AFL), Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent,

[1]The General Counsel and the attorney appearing as his representative at the hearing are referred to herein as the General Counsel; the National Labor Relations Board, as the Board.

herein called the Respondents, alleging that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A), (2) and (3), and Section 2 (6) and (7) of the Labor Management Relations Act, 1947,[2] herein called the Act. Copies of the complaint, amended charge, and notices of hearing, were duly served upon the Respondents and the Employer.

With respect to the unfair labor practices, the complaint alleges in substance that:

1. The Employer, who is engaged in the business of photo finishing and the sale of photographic equipment and supplies, causes a substantial amount of such merchandise to be transported and delivered to him in interstate commerce, and likewise causes quantities of his finished products to be transported to his customers in interstate commerce, and is therefore engaged in commerce within the meaning of the Act;

2. Since before November 1, 1947, the Respondent Union has been the duly designated collective bargaining representative of the Employer's clerical employees, who constitute a unit appropriate for the purposes of collective bargaining;

3. Although duly requested by the Employer, the Respondent Union has at all times since November 1, 1947, refused to bargain collectively in good faith with the Employer;

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[2]The National Labor Relations Act, 49 Stat. 449, as amended by Public Law 101, Chapter 120, 80th Congress, First Session (61 Stat. 136).

4. The Respondent Union, and its officers, agents, organizers, and representatives, including Respondents Tidwell and Morgan, have since November 1, 1947, restrained and coerced employees of the Employer by: (a) refusing to bargain collectively with the Employer in good faith; (b) attempting to impose and imposing upon such employees requirements that they obtain and maintain membership in the Respondent Union as a condition of employment;

5. The Respondents have since November 1, 1947, attempted to cause the Employer to discriminate against his employees by insisting and seeking to compel the Employer to establish and maintain a closed shop;

6. By the aforesaid acts the Respondents have engaged and are engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A), (b) (2) and (b) (3) of the Act.

The Respondents did not file an answer to the complaint. Pursuant to notice, a hearing was held at Los Angeles, California, on April 21, May 3, and May 4, 1948, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. All parties were represented by counsel, were afforded full opportunity to participate in the hearing, to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. The Respondents appeared specially through counsel, who, at the opening of the hearing, filed a written motion, supported by a memorandum of

law, to dismiss the complaint on the grounds that since, as Respondents contend, the Employer is not engaged in commerce within the meaning of the Act, the Board has no jurisdiction over the Respondents or the subject matter herein involved; and that the Act is unconstitutional, being in derogation of the First, Fourth, Fifth, Tenth, Thirteenth, and Fourteenth Amendments to the Constitution of the United States. Insofar as the motion to dismiss was founded on the asserted lack of jurisdiction of the Board, it was denied with leave to renew it after introduction into evidence of the General Counsel's case with respect to the business operations of the Employer. Insofar as the motion to dismiss was based on the asserted unconstitutionality of the Act, the undersigned stated for the record that as agent of an administrative agency, he would conform to the Board's policy of assuming the constitutionality of the Act.[3] The motion to dismiss was, therefore, denied. The undersigned also denied motions to strike certain paragraphs of the complaint, made by counsel for the Respondents on the ground that the said paragraphs stated merely conclusions of law.

A demand for a bill of particulars submitted orally by counsel for the Respondents was granted in part. Pursuant to such ruling, the General Counsel furnished the additional information ordered, on the record.

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[3]See Matter of Rite-Form Corset Co., Inc., 75 N.L.R.B. 174.

Before the completion of the General Counsel's case with respect to the interstate commerce aspects of the business of the Employer, counsel for the Respondents, on behalf of his clients, withdrew from further participation in the hearing, after making a statement for the record setting forth his reasons for doing so.[4] Thereafter the hearing proceeded to its conclusion in the absence of the Respondents and their representatives.

Before closing the hearing, the undersigned granted a motion of the General Counsel to conform the pleadings to the proof with respect to such formal matters as the spelling of names, dates, and the like. A motion by the General Counsel to dismiss the complaint with respect to Albert E. Morgan as a party Respondent was granted without objection.[5] All parties present having been afforded opportunity at the close of the hearing to be heard

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[4]Respondents' counsel asserted that since "this Board patently . . . has no jurisdiction" because "this is purely and exclusively and admittedly a retail store, having three employees . . ., it appears there would be no purpose served on the part of Respondents to continue this hearing any further, having reserved their right to objections and to a copy of the transcript, and to file, if necessary, at the time, as it may occur, any objection to the intermediate report . . ."

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[5]Since, as above described, the complaint has been dismissed insofar as it joins Morgan as a party Respondent, the undersigned will hereinafter refer to the Union and the Respondent Tidwell as "the Respondents."

in oral argument, the General Counsel was so heard. The undersigned allowed all parties 15 days from the closing date of the hearing within which to submit briefs and proposed findings of fact and conclusions of law. Counsel for the employer has filed a brief and proposed conclusions of law.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact[6]

I. The Business of the Employer

Henry Wilbert Smith, the Employer and charging party herein, is the sole proprietor of a retail photographic supplies store located in San Pedro, California, which he operates under the assumed name and style of A-1 Photo Service. He is engaged, in this business, in buying, and selling at retail, photographic equipment and supplies, greeting cards, and stationery. During the period from April, 1947, through March, 1948, both inclusive, the Employer

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[6]Since the Respondents withdrew from the hearing shortly after the General Counsel began to introduce evidence in support of the allegations of the complaint, the findings of fact herein made are based on evidence standing undenied in the record. From the statement made by counsel for the Respondents at the time they withdrew from further participation in the hearing, and from the motion to dismiss the complaint filed on their behalf before their withdrawal, it would appear that they base their defense solely on their contentions: 1. That the Act is unconstitutional, and 2. That the Board lacks jurisdiction over the parties and the subject matter.

purchased merchandise for his aforesaid business, of a value of $100,146.69. Of this amount, merchandise of a value of $44,406.63 was purchased from wholesalers located outside the State of California, and delivered to the Employer's aforesaid store in San Pedro, by mail or common carrier, from states of the United States other than the State of California. The rest of the merchandise purchased by and delivered to the employer during the same period, of a value of $55,740.06, was purchased from sellers located in the State of California. Most of the merchandise so purchased from establishments in the State of California, was delivered to the employer from within the said State. A small proportion, however, although ordered from local jobbers or local branch offices of national companies, was shipped to the Employer's store from points outside California. Of the merchandise delivered to the Employer by local wholesale dealers from within California, a substantial proportion originates, i.e., is shipped to the local suppliers, from outside the State of California.[7]

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[7]The above finding is based on the testimony of the Employer, Smith, and on that of Sunderman, purchasing agent of one of the Employer's local suppliers. Smith "estimated," on the basis of his experience in the photographic equipment business, that approximately 90 per cent of the merchandise sold and delivered to him locally, was received by his local suppliers from factories located outside of California. He testified that this estimate was based upon statements made to him by some of his local suppliers, as to the origin of the merchandise they

During the calendar year 1947, the Employer's sales at his San Pedro store totaled $133,715.51. The total of his sales for the period from April, 1947, through March, 1948, was approximately the same. The Employer's aforesaid annual sales consisted entirely of merchandise sold and delivered to retail customers within the State of California ex-

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sold to him, and the fact that to his knowledge, some of the manufacturers of the merchandise sold to him by local dealers, had plants located exclusively in States other than California. Were this the only evidence in the record as to the origin of the merchandise in question, the undersigned would be dubious as to its probative value. However, Sunderman, purchasing agent for Craig Movie Supply Co., one of the local wholesalers selling merchandise to Smith, testified in convincing detail, on the basis of records, that Smith purchased from Craig during the year, merchandise comprising a "rough cross section of [Craig's] entire line," and that approximately 90 per cent of the merchandise handled by Craig is shipped to it from outside the State of California. Since Sunderman's testimony, which was based on first-hand knowledge of Smith's and Craig's purchases, corroborated Smith's testimony, the undersigned is persuaded that sufficient basis is afforded by the record to support the finding made above. There was no specific corroboration of Smith's estimate with respect to the origin of the merchandise purchased locally from suppliers other than Craig; therefore the undersigned does not feel that he can make a finding as to the percentage of such locally purchased merchandise which originated outside of California. It is a fair conclusion, however, from the evidence as a whole, that a substantial proportion of all of the merchandise purchased by and delivered locally to Smith, was shipped from points outside the State of California to the California wholesalers who sold it to Smith.

cept merchandise valued at approximately $600, which was delivered to customers outside that State, and merchandise valued at approximately $2400, sold and delivered to installations of the United States Army and Navy.

The Respondents contest the jurisdiction of the Board on the asserted ground that the Employer is not engaged in commerce within the meaning of the Act. Their argument is, in brief, that the business operated by the Employer is purely a local, retail enterprise, employing only three clerks,[8] and that a labor dispute involving his employees would not have such a direct and substantial effect upon interstate commerce as to be cognizable under the Act.

The Employer, in the course of his business operations, regularly receives a substantial volume of merchandise, comprising about 44 per cent of his total purchases, directly through the channels of interstate commerce. In addition, a substantial proportion of the merchandise delivered to him from points within the State of California originates from outside that State. It is too well-settled to require citation of authority that the operation of such a business involves and affects interstate commerce to such an extent as to bring it under the jurisdiction of the Board. On occasion the Board has declined to exercise its jurisdiction over retail

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[8]Smith testified without denial, and the undersigned finds, that he regularly employs three clerks at his San Pedro store, sometimes, during certain rush periods, adding a fourth clerk to his sales staff.

enterprises similar to that of the Employer, but such action has been based on policy considerations not properly within the province of the undersigned. The sole issue confronting the undersigned is whether the Board has jurisdiction over the case at bar, not whether, as a matter of public policy, it should assert it.

It is found that the Employer, H. W. Smith, doing business as A-1 Photo Service, is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

Local 905 of the Retail Clerks International Association (AFL), is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. History of bargaining between the Employer and the Respondent Union

The Employer hired the first clerk for his San Pedro store during the latter part of 1944. Informed by the clerk that she was a member of the Respondent Union (hereinafter called the Union), the Employer signed a collective bargaining contract with that organization, covering the clerk's wages, hours, and working conditions. Shortly before the expiration of the aforesaid contract on January 31, 1945, the Employer joined the San Pedro Business Men Associated, Inc. (hereinafter called the Associated), which, as its name implies, is an organization composed of business men of the San Pedro area, and which, among other activities,

bargains collectively with the Union on behalf of those of its members who employ clerical workers. The Associated negotiated a master-contract with the Union, which was effective for a year beginning February 1, 1945, and the Employer became a party thereto by ratifying it. Thereafter the Employer, through his bargaining representative, the Associated, entered into contracts with the Union from year to year, the last such contract becoming effective on February 3, 1947, for a term expiring January 31, 1948. Shortly after entering into his second contract with the Union in February, 1945, the Employer hired an additional clerk; about a year later, he employed a third clerk. Since then, he has continuously had three clerks in his employ at his San Pedro store. During periods of increased business such as occur at the Christmas season and during the summer months, he temporarily adds an extra clerk to his sales staff. Included in all the aforesaid contracts to which the Employer and the Union have been parties, were clauses providing that the Employer "employ only members in good standing with" the Union, and that "after a new employee is hired and prior to going to work, said employee shall obtain a Clearance Card from the office of the Union immediately." Pursuant to such contracts, the Employer has, since 1944, hired as clerks only members of the Union, who submitted to him a "clearance card" issued by the Union, indicating that the new employee was a member of, and approved by, the Union for employment in the Employer's store.

B. Bargaining between the parties since the effective date of the Labor Management Relations Act, 1947

Certain provisions of the Labor Management Relations Act, 1947, amending the preceding National Labor Relations Act, went into effect on August 22, 1947.[9] Among other changes effected by these amendments, is one making the "closed shop" illegal.

The last contract in effect between the Union and the employers represented by the Associated provided that it was to "continue until January 31, 1948, and from year to year thereafter, subject to alteration or amendment by written notice given by either party thirty days prior to each January 31st." The contract also embodied clauses reading as follows:

> 1. After a new employee is hired and prior to going to work, said employee shall obtain a Clearance Card from the office of the Union immediately.
>
> 2. The [Employer] agrees to employ only members in good standing with [the Union].

In a letter dated November 29, 1947, and delivered by registered mail on December 1, 1947, the Associated notified the Union that it did not desire

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[9]The new Act was enacted on June 23, 1947. Pursuant to Section 104 thereof, the amendments contained in Section 8 (a) (3), and 8 (b) (1), (2), and (3), which are involved in this proceeding, became effective 60 days thereafter.

to renew, alter, or amend the aforesaid contract, but that it did desire that the agreement terminate by its terms "as of midnight January 30, 1948." The letter also informed the Union that the Associated had been designated as collective bargaining representative of the employer-parties to the contract, for the purpose of "meeting, conferring, and negotiating a new contract with representatives of your union at reasonable times on and after December 1, 1947." The Associated never received an answer to the aforesaid letter. A few days later, however, on or about December 3rd, Smith and other employers represented by the Associated[10] received mimeographed letters, addressed to "Business Men and Women of the Harbor District," and bearing

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[10]There is in evidence an authorization card dated December 4, 1947, signed by Smith and delivered by him to the Associated, wherein he designates the Associated as his representative "for the purpose of meeting, conferring and negotiating a new contract with the representatives of Local 905 at reasonable times hereafter; provided that any negotiations or agreements between [the parties] shall not be binding on the undersigned Employer until such time as the Employer shall have ratified and signed the agreement."

The above authorization card was apparently signed in order to extend the Associated's authority to represent the Employer, which, as is apparent from the findings heretofore made, it possessed since the latter part of 1944. The undersigned finds that at all times material herein, the Associated was the duly designated collective bargaining representative of the Employer, with authority to negotiate on his behalf, subject to his ratification, collective bargaining contracts with the Union.

the typed signature of Respondent Tidwell, as secretary of the Union, appealing to the employers to "reconsider the action" taken by the Associated, and to "withdraw the notice of termination of our working agreement and to continue for another year the present agreement that we have." The letter also stated that the members of the Union had "voted unanimously at their last meeting not to ask for any increase or to make any change in the present working agreement for another year." It went on to say that the attorneys for the Associated had advised "many of the business men that the present contract is a violation of the Taft-Hartley Law," but that "this is not true. Any attorney who is not looking for business will tell you that the National Labor Relations Board has never taken jurisdiction over any retail establishment, except very large stores that are engaged in interstate commerce." The letter predicted that "if these lawyers are going to talk the Business Men into reopening the contract, an economic struggle which will be disastrous to the community will develop . . ."

On December 5, 1947, the Associated mailed a proposed new contract to the Union, and in a covering letter requested the Union to set a date for a meeting with the negotiating committee and attorneys of the Associated,[11] for the purpose of nego-

[11]The negotiating committee of the Associated consisted of H. W. Smith, the charging Employer herein, W. T. Grace, and President B. M. Malone of the Associated. Its legal counsel were the same as those appearing for the Employer at the hearing.

tiating a new agreement. Pursuant to arrangements made over the telephone between President Malone of the Associated and Secretary-Treasurer Tidwell of the Union, Tidwell appeared at the offices of the Associated on December 9, 1947, where the negotiating committee of the Asociated and its attorneys were waiting to meet with him. Tidwell met the acting secretary of the Associated in an outer office, and asked to see Malone. Malone, and Neary, one of the Associated attorneys, left the inner office, in which the representatives of the Associated were gathered, and after some time returned to the group and announced that Tidwell had left, refusing to meet with them because of the presence of the attorneys.

In a letter addressed to Tidwell as secretary of the Union, dated December 10, 1947, the Associated reiterated its request for a meeting to negotiate an agreement. No answer was received by the Associated to this letter.

On December 31, 1947, the Associated mailed a letter to the Director of the Federal Mediation and Conciliation Service, notifying him, pursuant to the requirements of Section 8 (d) (3) of the Act, that a dispute existed between itself and the Union, arising out of "the failure and/or refusal of the Union to bargain collectively with the [Associated] who are the duly authorized collective bargaining representatives of approximately 67 retail stores in San Pedro, Wilmington and Torrance." A copy of this letter was mailed to the Union.

On January 20, 1948, for the first time since the Associated had requested conferences to discuss a new contract for 1948, committees representing the Union and the Associated met. Present for the Union were Tidwell and two other representatives. Attorneys Neary and Binkley, and several members of the negotiating committee of the Associated, excluding Smith, represented the latter organization. Neary outlined the proposals of the Associated with respect to a new contract, taking the position that the employers could not renew the agreement then in effect as was demanded by the Union because it contained a closed shop provision. Neary also proposed that the new agreement include an arbitration clause. To this Tidwell replied that "under no circumstances would he change one comma, one period, or one word in the contract as it had existed from 1947 to 1948." A discussion ensued during which Neary suggested that the first two paragraphs of the 1947 contract (which have been set forth above) might possibly be interpreted as constituting "union shop" rather than "closed shop" provisions—especially in view of the language of the first paragraph—and that if so interpreted, such a provision "would be permitted under the Labor Management Act." Tidwell objected to any such interpretation, stating that "no employer in San Pedro is going to hire any employees except members of my union. And they haven't hired any except members of my union." Neary then asserted that on occasion, when employers had sought to hire

extra help for rush periods, the Union had refused to issue clearance cards to non-union members who had been offered such employment, and who had applied for membership in the Union, in order to become eligible to accept the offered employment. Tidwell admitted that this was true, explaining that the Union would not accept new members so long as existing members were not employed. In response, Neary contended that this constituted a "closed union," and that "a closed union together with a closed shop . . . was illegal under the laws of California."[12] Tidwell closed the discussion by remarking, "Mr. Neary, if you want to fight this out, you fight it out in the Courts with Mr. Schullman [counsel for the Union]. And I will fight it out with blood on the streets with the employers of San Pedro."

A week later, on January 27, 1948, the negotiating committee of the Associated (without its attorneys), met with Tidwell and two other representatives of the Union. On this occasion the representatives of

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[12]The findings as to the discussion at the above-described meeting are based on the credited testimony of Attorney Binkley, which was corroborated by that of the witness Grace. In his brief, counsel for the Employer urges that a finding be made that the Union is a "closed union," in violation of Section 8 (b) (2) of the Act. The undersigned makes no such finding, since he does not deem that issue to have been raised by the complaint or to have been litigated at the hearing. In any event, the evidence in the record is not viewed by the undersigned as sufficient upon which to base a finding.

the Associated again requested that the closed-shop clause of the old contract be eliminated, and that the new contract contain provisions for arbitration and a no-strike guarantee. Tidwell offered to enter into a contract with the Associated on the latter's own terms, on condition that the Associated persuade the management of certain J. C. Penney stores, formerly operated in San Pedro and nearby towns, to reopen its said stores, and to observe union conditions with respect to the clerks employed therein. As an alternative, Tidwell proposed, the Union would make the aforesaid concession with respect to a new contract, if the Associated would publish a statement in a newspaper denouncing the Penney management for refusing to pay the union wage scale.[13] After putting forward these proposals, Tidwell left, saying that if the Associated would comply with the aforesaid conditions, another meeting could be arranged to discuss a new contract. The Associated did not accede to the Union's aforesaid proposal with respect to the Penney Company.[14] The next day, Attorney Binkley had a telephone conversation with Tidwell, during which he asked Tidwell whether he was insisting that the employers renew the old contract without any changes. Tidwell answered that that was correct. Binkley then asked, "Wouldn't that leave us, then, with nothing

[13]The Penney Company was not a member of the Associated.

[14]The above findings are based on the credited testimony of Smith and Grace.

but a straight closed shop?" To this Tidwell replied, "I don't care what you call it." Binkley asked, "Will you modify that closed shop in any way if we can submit evidence to you that some of our employers are in interstate commerce?" Tidwell's answer to this was, "We won't modify a damn thing." The conversation closed with Binkley asking when the Union would be willing to "meet and negotiate further," and Tidwell answering, "We won't. We are through."[15]

On February 3, 1948, the negotiating committee and counsel for the Associated, and three representatives of the Union, including Tidwell, met with mediators representing the Federal Government and the State of California. At the suggestion of the Federal mediator, counsel for the Associated outlined the background of the dispute, indicating that the two points of difference between the parties were: (1) The Union's insistence on the retention of the closed-shop provision in the contract, and the employers' contention that this was prohibited by law; and (2) The proposal of the Associated that arbitration and no-strike clauses be added to the contract, and the Union's refusal to accept this proposal. Tidwell then spoke for the Union, asserting that he had never had trouble in the past in

[15]The above findings are based on Binkley's credited testimony; the detailed quotations were recollected by the witness with the aid of an affidavit with respect to the conversation, based on notes taken by him at the time the conversation took place.

reaching agreements with employers of the San Pedro area; that the Union had always been able to resolve disputes with employers without an arbitration provision; and that the closed-shop clause was a necessary protection for the membership of the Union, which he would not consent to eliminate. He concluded with the statement that the Union would make no change whatsoever in the old contract. When the mediator suggested that arrangements be made for further meetings, Tidwell said that he "would meet and meet and meet until hell freezes over, but that he would not make any changes in the old contract." The mediator then asked Tidwell to promise to refrain from taking any economic action against any employer represented by the Associated, in order to compel the employer to sign up individually with the Union. Tidwell refused to make any such promise, saying that he would take whatever action the members of the Union voted for. Tidwell then asked to be excused, and the meeting concluded.[16]

During the few days immediately preceding the above-described meeting with the mediators, namely on January 30, 31, and February 2, 1948, the charging Employer herein received telephone calls from Tidwell, in which the latter asked the Employer to sign for another year the contract which had just expired. The Employer told Tidwell that

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[16]The above findings are based on the credited testimony of Binkley, Smith, Grace, and DeLaney, whose recollections as to the discussion were in substantial agreement.

he had authorized the Associated to negotiate a contract for him, and that he would not individually sign an agreement with the Union. Tidwell argued that the old contract was not illegal, and that the Employer "Was practically the only one who had not signed it." The Employer stated that he had been advised by counsel that a closed-shop contract was illegal, and that he would not sign such a contract.[17]

On or about April 1, 1948, the Central Labor Council of San Pedro and Wilmington notified the Employer that at the request of the Union, it

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[17]Based on the credited testimony of Smith.

Charles E. Williams, operator of a furniture store in San Pedro, testified that although he is a member of the Associated, he was approached by Tidwell several times prior to the expiration of the 1947 contract, and was requested to sign a new contract with the Union as an individual employer. When Williams inquired why he was being asked to enter into an agreement by the Union prior to negotiations with the Associated, despite the fact that he had authorized that organization to bargain for him, Tidwell answered that "he was operating this year in a different manner," and that if Williams "didn't want any trouble," he "better sign it, because we never could reach an agreement through any lawyer that the [Associated] could employ." Williams finally acceded to Tidwell's demand, and on January 31, 1948, signed a contract with the Union, effective from February 1, 1948, to January 31, 1949, which contained identical terms as those incorporated in the preceding agreement. The undersigned credits Williams' testimony with respect to the foregoing, and finds that the incidents occurred as above summarized.

had placed the Employer's "firm on [its] official We Don't Patronize List."[18]

Since the events hereinabove summarized, the Union has requested no further collective bargaining conferences with the Associated or with the employer, and no such meetings between representatives of the parties have been held.[19]

C. Concluding Findings

1. The Refusal to Bargain

(a) The appropriate unit

The complaint alleges that "all clerical employees excluding supervisors employed by the Employer at his place of business in San Pedro, California, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act . . ." That allegation stands undenied in the record. Moreover, the evidence establishes, and the undersigned finds, that the only employees employed in the San Pedro store of the Employer

[18]At a meeting of the Central Labor Council held on or about March 22, 1948, Secretary Tidwell of the Union had presented to the Council his organization's complaint that the Employer had refused to sign a contract with it, and counsel for the Employer had stated his client's version of the dispute. The findings with respect to this incident are based on the testimony of Smith and Binkley, and on communications from the Council to Smith, which are in evidence.

[19]Based on the credited testimony of Smith and Binkley.

are three regular sales clerks, a fourth clerk added temporarily to the sales staff during seasonal rush periods, and a part-time public accountant. The Employer himself, and his wife, act as supervisors. Since 1944, when the Employer hired his first clerk, until the expiration of the contract between himself and the Union on January 31, 1948, he has been a party to collective bargaining contracts with that organization, covering the wages, hours, and working conditions of the clerks in his employ. These agreements, being in the form of master-contracts negotiated between the Associated and the Union, and to which the employers represented by the Associated became parties by their ratification thereof, did not describe the units in any of the enterprises covered by the contracts, but merely listed the classifications of employees so covered. Smith's testimony, however, makes it clear that it was understood between the parties that the unit consisted of the clerks in his employ at his San Pedro store. Since, so far as appears, the unit thus agreed upon satisfactorily served the parties as a basis for collective bargaining throughout the history of their relationship, the undersigned concludes and finds that all clerical employees, excluding supervisory employees and the public accountant employed on a part-time basis, by the Employer at his place of business in San Pedro, California, constitute, and at all times material herein constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

(b) Representation by the Union of a majority of employees in the appropriate unit

Smith testified that in accordance with the contracts between himself and the Union, he had never hired as clerks anyone except members of the Union, who presented to him a clearance card from that organization attesting to their membership therein. He testified further that so far as he knew all of the clerks in his employ were still members of the Union since none had ever indicated that he or she had withdrawn therefrom. The record thus makes it clear, and the undersigned finds, that at all times since November 1, 1947, the Union has been the duly designated representative of all of the employees in the appropriate unit above defined, and that, by virtue of Section 9 (a) of the Act, it has been and is now the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

(c) The Respondents' refusal to bargain, in violation of Section 8 (b) (3) of the Act

Section 8 (b) (3) of the Act makes it an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9 (a)."

As appears from the findings hereinbefore made, the Employer, through the Associated, his duly designated collective bargaining representative, repeatedly requested the Union, which was the

collective bargaining representative of his employees in an appropriate unit, to bargain with him concerning a new contract to replace that expiring in January, 1948, and the Union through its agent, Tidwell, adamantly insisted that the old contract be renewed without any change whatsoever. The only occasion on which the Union indicated any willingness to reach an agreement not identical with the one previously in effect between the parties, was on January 27, 1948, when Tidwell stated that he would accept a contract on the Employers' terms, provided the Associated induce the J. C. Penney Company to pay the union scale of wages to its employees, or, in the alternative, publicly denounce the Penney Company for its refusal to do so. When the Associated refused to accede to this condition, the Union resumed, and thereafter unswervingly adhered to its position that it would sign no contract with the Employer except one incorporating the exact terms of the old one. The Employer was under no obligation to interfere in a labor dispute to which he was not a party, and the Union had no right to make such interference on his part a condition of reaching an agreement. By insisting that it would sign no contract which in any way departed from the terms of the preexisting agreement, the Union took the position that any contract negotiated between itself and the Employer must provide for a closed shop, for, as we have seen, such a clause was written into the previous contract, and was enforced by the parties. The issue arising from this posture of the facts is whether the unyielding

insistence on the part of the Union and its agent, Tidwell, that the Employer sign a closed-shop contract, constitutes, on their part, a refusal to bargain within the contemplation of Section 8 (b) (3) of the Act.

The General Counsel contends that since the Act prohibits a closed-shop contract, the Respondents' aforesaid conduct constituted a refusal to bargain in good faith. The undersigned finds it unnecessary to pass on the good faith of the Respondents. There is nothing in the record which casts doubt on the good faith of the Respondents in contending to the Employer throughout the negotiations between them, and before the undersigned at the hearing, that the business operated by the Employer is not engaged in commerce within the meaning of the Act, and that, therefore, the prohibitions of the Act do not apply to the relationship between the Union and the Employer. But the good faith of their belief that the Act has no application to the present controversy, affords the Respondents no defense. The Act outlaws the closed shop, and the Employer was therefore entitled to refuse to entertain any proposals from the Union providing for such an arrangement. As a corollary, the Union and its agent cannot be said to have been bargaining within the contemplation of the Act when they steadfastly refused to agree to any contract not containing that illegal provision. Although the Respondents based their insistence on a closed-shop contract, which is prohibited by the Act, on their assumption that the Employer's business operations are of such a nature

as to render inapplicable the prohibitions of the Act, they took the risk that this assumption was incorrect. That issue having been resolved against them, it follows that regardless of the bona fides of their belief, their conduct has constituted a violation of their statutory duty to bargain with the Employer. On the basis of the foregoing, and the entire record, the undersigned concludes and finds that on or about December 3, 1947,[20] and at all times since, the Union, and the Respondent Tidwell as its agent, refused, and have continued to refuse to bargain collectively with the Employer, as representatives of the latter's employees in an appropriate unit, in violation of Section 8 (b) (3) of the Act.[21]

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[20]On the above date, following the first request of the Associated that the Union negotiate a new agreement with it, the Union, through Tidwell, mailed letters to the employers represented by the Associated, taking the position that it wished to renew the old contract without any change.

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[21]Some question may be raised as to the propriety of the above finding with respect to the Respondent Tidwell. It might be argued that the Union, not Tidwell, bore the obligation to bargain, since it, not he, was the bargaining representative of the employees. Since no duty to bargain rested upon Tidwell, this line of reasoning would go, no finding may be made that he engaged in conduct violative of that duty. The record establishes that Tidwell was at all times herein material an officer, to wit, secretary, of the Union, and that he represented the Union in all its dealings with the Employer. His role as agent of the Union is thus beyond question. It was through Tidwell that the Union engaged in the conduct which constituted the refusal to bargain. Tidwell's conduct as agent of the

(d) Alleged restraint and coercion of the Employer's employees by the Respondents, in violation of Section 8 (b) (1) (A)

The complaint alleges that by "refusing to bargain collectively in good faith with the Employer . . . [and] attempting to impose and imposing upon employees of the Employer certain conditions of employment requiring said employees as a condition of employment to obtain and maintain membership in [the Union] in contravention of the Act," the Respondents, in violation of Section 8 (b) (1) (A) of the Act, restrained and coerced the said employees in the exercise of the rights guaranteed in Section 7. The latter section reads as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual

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Union, was, in other words, violative of the Union's duty to bargain. The undersigned is persuaded that in undertaking the role of agent of the Union, Tidwell assumed the obligation resting upon his principal to bargain collectively with the Employer. The language of the Act seems to answer in the affirmative the question whether an agent of a labor organization may be held answerable for acts committed by him in his representative capacity. Section 8 (b) reads: "It shall be an unfair labor practice for a labor organization or its agents [to engage in the conduct thereinafter defined]." (Underlineation supplied.)

> aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

It is the contention of the General Counsel that the conduct of the Respondents which has been found to constitute a refusal to bargain with the Employer, had the effect of restraining and coercing his employees in the exercise of their rights as above set forth. This theory, it seems to the undersigned, can be sustained only if it is found as a fact that the Union is not the freely chosen collective bargaining representative of the Employer's employees, acting on their behalf, and executing their wishes, but that in its negotiations with the Employer it was seeking to impose on him terms to which the employees, as well as the Employer, were opposed. The record contains nothing on which to base such a finding. It will be remembered that all of the employees of the Employer are members of the Union, and that, consequently, the Union has been found to be their duly designated agent for purposes of collective bargaining. Indeed, that finding was urged by the General Counsel in his complaint, and it was an indispensable element of his case with respect to the refusal of the Respondents to bargain. In the absence of evidence indicating that the Union, the freely chosen agent of the employees, has conducted itself contrary to the instructions of its principals vis a vis the Employer, the allegation of

the complaint that the Respondents restrained and coerced the employees must necessarily fall unless there is some rule of law creating a presumption that, in the circumstances of this case, the Respondent's conduct was contrary to the desires of the employees. The undersigned is aware of no such legal principle.

Counsel for the Employer has submitted a brief urging that conduct in violation of Section 8 (b) (3) of the Act is automatically in contravention of Section 8 (b) (1) (A). He points out that a refusal to bargain on the part of an employer, in violation of Section 8 (5) of the old Act (Section 8 (a) (5) of the Act as amended) has always been considered to constitute a violation of Section 8 (1) of the old Act, and Section 8 (a) (1) of the Act as amended. "Is it rational, then, and consistent," he asks, "to say that what is an unfair labor practice by the employer under 8 (a) (1) is not an unfair labor practice by the Union under 8 (b) (1) (A)"?

The undersigned is persuaded that the foregoing question must be answered in the affirmative. Reference to the language of the Act discloses that Section 8 (a) (2), (3), (4) and (5) are merely particularized definitions of some types of employer-conduct having the effect, generally described in Section 8 (a) (1), of interfering with, restraining, and coercing employees in the exercise of their rights as guaranteed in Section 7. The logical conclusion from these facts is that any conduct by an employer which is prohibited by Section 8 (a) (2), (3), (4) or (5), necessarily constitutes a violation

of the employer's obligation, as formulated in Section 8 (a) (1), to refrain from interfering with, restraining, or coercing his employees in the exercise of their statutory rights. However, this line of reasoning cannot be applied mechanically to acts committed by a labor organization (or its agent), which are violative of Section 8 (b) (3) of the Act, because the same interrelationship between such acts and those prescribed by Section 8 (b) (1) (A) does not exist as between employer-conduct violative of those subsections of 8 (a) other than 8 (a) (1) and the latter. When an employer commits any unfair labor practice, such conduct on his part constitutes a violation of Section 8 (a) (1) because that section is a formulation in general terms of the various specific forms of employer-conduct defined as interference with, restraint, or coercion of the employees' rights. But when employees, acting through their chosen bargaining agent, elect to engage in conduct which constitutes a refusal to bargain as defined in Section 8 (b) (3), it is not logical to conclude that they thereby restrained and coerced themselves in violation of Section 8 (b) (1) (A).

Counsel for the Employer contends in his brief that there is a presumption that the Respondents herein, by insisting on a closed-shop contract, were acting contrary to the wishes of the membership of the Union, because, as he asserts, the law will presume that "the members of a Union have authorized their agents, in this case the Respondents, to do that which is legal, namely, to bargain with the employer as required by the provisions of the Act."

No authority is cited in support of this proposition.[22] So far as appears from the record, none of the employees herein involved has ever revoked the authority of the Union to act as his collective bargaining representative, nor is there any showing that any member has ever repudiated the Union's authority to demand, on his behalf, a renewal of the closed-shop contract.[23] Unless we are to presume

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[22]For whatever help they may be to an analysis of this issue, the undersigned refers to the following recognized principles of the law of agency. An agent's apparent powers are considered to be his real powers, and the expression, "apparent authority" is defined as connoting that authority which a principal holds his agent out as possessing, under such circumstances as to estop the principal from denying its existence. (2 Corpus Juris Secundum, Agency, Sec. 96 (a) and (b)). The authority which the principal intended that the agent have may be implied from the principal's acquiescense in the exercise by the agent of his powers. (Abid., Sec. 99 (a)).

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[23]In answer to the argument of counsel for the employer that they were restrained from so doing by reason of the closed-shop conditions under which they were employed, it may be pointed out that the closed-shop contract in effect between the Union and the employer expired at the end of January, 1948, and has never been renewed; that the hearing herein ended on May 4, 1948; and that despite the announced firm intention of the employer to refuse to agree to a renewal of a closed-shop contract, no member of the Union has been shown to have repudiated the authority of the Union to represent him, or to take the position taken by that organization with respect to its demand for a closed-shop contract.

that the membership of the Union has no voice in the determination of its policies, which the undersigned has no warrant to believe, it must be concluded that the Union and its agent, Respondent Tidwell, were authorized by the membership to take the position they did in their negotiations with the Employer. As a matter of fact, the labor organization herein involved is not unique in contending that the employers with which it has bargaining relationships are not engaged in commerce, or that, for some other reason, the prohibitions of the Act against the closed shop do not apply to them, and in insisting, therefore, that its demands for closed-shop agreements are perfectly proper. A number of cases arising out of such contentions are presently awaiting final determination by the Board and the Courts. In these circumstances, it would not be surprising if the membership of the Union herein involved, as well as of the others mentioned, had authorized their bargaining agents to seek a test before the proper tribunals, of their aforesaid contentions.

The undersigned, for the foregoing reasons, will recommend that the complaint be dismissed insofar as it alleges that the Respondents' conduct in demanding a closed-shop contract was violative of Section 8 (b) (1) (A) of the Act.[24]

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[24]Counsel for the employer advances the argument in his brief that the Respondents' "boycott to force the employer to threaten his employees with discharge if they do not remain members of the Union is in itself a restraint upon the employees in the exercise of their rights under Section 7." This

(e) Alleged attempts by the Respondents to cause the Employer to discriminate against his employees, in violation of Section 8 (b) (2) of the Act.

Section 8 (b) (2) of the Act prohibits a labor organization or its agents from causing or attempting to cause "an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." (Underlineation supplied.)

The complaint alleges and the General Counsel contends that the Respondents' conduct in insisting that the Employer sign a closed-shop agreement constituted an attempt to cause the Employer to discriminate against his employees, in violation of Section 8 (b) (2).

In support of the aforesaid contention of the General Counsel, counsel for the Employer argues in his brief that "if it is an unfair labor practice

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reference to a boycott is undoubtedly to the listing of the employer on the "unfair list" of the Central Labor Council, which action was taken at the request of the Respondents. For the same reasons as above stated, the undersigned sees no merit in this contention. We are called upon to presume, without supporting evidence, that the action initiated by the employees themselves, through their Union, had the effect of restraining themselves in the exercise of their rights under the Act.

under 8 (a) (3) for an employer to sign a closed-shop agreement, and an unfair labor practice under 8 (b) (2) for a union to attempt to cause an employer to violate 8 (a) (3), it is an unfair practice under 8 (b) (2) for the Union to attempt to cause an employer to sign a closed-shop contract." This argument is based on the stated assumption that "it is an unfair labor practice under 8 (a) (3) for an employer to sign a closed-shop agreement." To the extent that this statement implies that the argument fails if the assumption upon which it is founded is shown to be incorrect, the undersigned finds himself in agreement with it. The pertinent provisions of Section 8 (a) (3) make it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. The commonly accepted definition of the word, "discriminate," in the sense in which it is used in this section, is, "to make a difference in treatment or favor of one as compared with others."[25] To hold that the mere signing of a contract by an employer, in which he agrees to discriminate against nonmembers of a union, constitutes the act of discrimination, would be unduly to distort the plain meaning of the word. The undersigned is convinced that discrimination does not take place within the meaning of Section 8 (a) (3) until the employer

[25]Webster's Collegiate Dictionary, Fifth Edition (G. & C. Merriam Co.).

actually treats an employee, or applicant for employment, differently from others in respect to hire or tenure or some term or condition of employment, based on his membership or non-membership in a labor organization. Since what the Respondents were attempting to cause the Employer to do, namely to sign a closed-shop contract, would not in itself constitute discrimination as prohibited by Section 8 (a) (3), their said conduct should not be found to have been in violation of Section 8 (a) (2). This is not to say, as counsel for the Employer argues, that the prohibition of the Act against closed-shop contracts can be enforced "only after the performance of such illegal contract . . . [which] will tend only to encourage and facilitate violations of the Act, add to the difficulties of enforcement, and frustrate the intent and purposes of Congress." While a threat or promise to discriminate, on the part of an employer, does not constitute discrimination, it is undoubtedly true that such a threat does have the effect of restraining or coercing his employees, and prospective employees, in the exercise of their right to join or refrain from joining a labor organization. Consequently the signing by an employer of a closed-shop contract would constitute a violation of Section 8 (a) (1) of the Act. Thus, in a proper case, the remedial powers of the Board would be available to enjoin the execution or performance of such a contract even before any acts of discrimination had taken place.[26] But in the

[26]See, for example, the following Board decisions, in which the Board has adhered to a consistent

present proceeding we are not faced with this problem, since the Employer has refused to sign the closed-shop contract tendered by the Union. Moreover, it having been found that the Respondents' insistence on this illegal contract constituted a violation of Section 8 (b) (3), an order designed to remedy the effects of that unfair labor practice, and enjoining such conduct on their part in the future, will be recommended. Since to find a violation of Section 8 (b) (2) on the part of the Respondents, based on the same conduct, would necessitate a strained interpretation of the language of the statute, and since the policies of the Act will in any event be fully effectuated by the order directed against the 8 (b) (3) violation, the undersigned will recommend that the complaint be dismissed insofar as it alleges that the Respondents' insistence upon a closed-shop contract constituted a violation of Section 8 (b) (2).[27]

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policy of refusing to find that an employer's conduct in entering into a discriminatory contract constituted a violation of Section 8 (3) of the old Act, but in which it has pointed out that its remedial order directed against the 8 (1) violation adequately effectuated the policies of the Act: Matter of Palmer Fruit Co., 51 N.L.R.B. 924, 925; Matter of Worthington Creamery and Produce Co., 52 N.L.R.B. 121, 122; Matter of Flotill Products, Inc., 70 N.L.R.B. 119, 122; Matter of G. W. Hume Co., 71 N.L.R.B. 533, 534.

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[27]Although the complaint contains no such allegation, counsel for the Employer contends that "there is evidence in the record that Respondent Haskell Tidwell has, by his own admission" discriminated

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in Section III, above, occurring in connection with the business operations of the Employer, described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent Union, and the Respondent Tidwell, as its agent, have refused to bargain within the meaning of Section 8 (b) (3) of the Act, and in order to effectuate the policies of the Act, the undersigned will recommend that they cease and desist therefrom and, upon request of the Employer, or his duly designated representative, bargain with him.

The undersigned will also recommend that the

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against employees by denying them membership in the Union on grounds other than their failure to tender the dues and initiation fees uniformly required as a condition of acquiring membership, thus causing them to be refused employment. He argues that this conduct by Tidwell constituted a violation of Section 8 (b) (2). As has been above found with respect to a similar contention advanced by counsel for the Employer, the undersigned does not deem this issue to have been properly raised, nor does he regard the evidence in the record as adequate to support a finding.

Respondents post appropriate notices to the membership of the Respondent Union, which it is found, will effectuate the policies of the Act.

Upon the basis of the above findings of fact and the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. H. W. Smith, doing business as A-1 Photo Service, at San Pedro, California, is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Local 905 of the Retail Clerks International Association (AFL) is a labor organization within the meaning of Section 2 (5) of the Act.

3. Haskell Tidwell, secretary of the Respondent Union, is, and at all times material herein was and acted as, an agent of the said Union for the purpose of collective bargaining with the Employer.

4. All clerical employees, excluding supervisory employees and the public accountant employed on a part-time basis, by the Employer at his place of business in San Pedro, California, constitute, and at all times material herein constituted, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

5. Local 905 of the Retail Clerks International Association (AFL) was at all times material herein, and now is, the exclusive bargaining representative of the employees in the aforesaid unit for purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

6. By refusing to bargain collectively with the Employer, the Respondent Union and the Respondent Tidwell as its agent, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (3) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

8. By their aforesaid conduct the Respondents have not engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) or Section 8 (b) (2) of the Act.[28]

Recommendations

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that Local 905 of the Retail Clerks International Association (AFL), Haskell Tidwell as its agent, and its other officers and agents shall:

1. Cease and desist from refusing to bargain collectively with H. W. Smith, doing business as A-1 Photo Service, of San Pedro, California, or with his duly designated collective bargaining representative, as the exclusive representative of the said Employer's clerical employees, excluding supervisory

[28]In his brief, counsel for the Employer submitted proposed conclusions of law. Consistent with the conclusions of law hereinabove made, the undersigned rules as follows upon the proposed conclusions filed by counsel for the Employer: Those numbered I through V, and that numbered VIII, are accepted. Those numbered VI and VII are rejected.

employees and the public accountant employed by him on a part-time basis, at his said place of business in San Pedro, California, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(a) On request, bargain collectively with the aforesaid Employer or his duly designated collective bargaining representative, as the exclusive representative of the employees composing the unit above found to be appropriate for the purpose of collective bargaining, with respect to rates of pay, hours of employment, or other conditions of employment, and if an agreement is reached, embody such agreement in a signed contract;

(b) Post in a conspicuous place or places at the business offices and/or meeting hall of the Respondent Union, or whatever place or places notices or communications to members are customarily posted, a copy of the notice attached hereto as Appendix A, and furnish copies thereof to each member of the Respondent Union who is employed by the Employer, either by mailing or by hand; copies of the said notice to be supplied by the Regional Director of the Board for the Twenty-first Region. The aforesaid notices shall be posted and distributed to members immediately upon their receipt, and shall remain posted as above recommended for a period of 60 days thereafter. Reasonable steps shall be

taken by the Respondents that the posted notice be not altered, defaced, or covered by other material;

(c) Notify the Regional Director of the Twenty-first Region in writing within twenty (20) days from the receipt of this Intermediate Report what steps the Respondent Union, and the Respondent Tidwell, as its agent, have taken to comply herewith.

It is further recommended that, unless the said Respondents shall within twenty (20) days from the receipt of this Intermediate Report notify the said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring them to take the action aforesaid.

It is recommended that the complaint be dismissed insofar as it alleges that the Respondents have engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) or Section 8 (b) (2) of the Act.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board —Series 5, effective August 22, 1947, any party may within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and

six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

If no statement of exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations and recommended order herein shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

Dated: July 19, 1948.

/s/ ISADORE GREENBERG,

Trial Examiner.

[Title of Board and Cause.]

STATEMENT OF EXCEPTIONS

Respondents above named, through their counsel, except to those portions of the Intermediate Report and Recommended Order, and to those portions of the Record, as follows:

1. Respondents except to that portion of the Findings of Fact, I, (I.R. p. 4) reading as follows: "Of the merchandise delivered to the Employer by local wholesale dealers from within California, a substantial proportion originates, i.e., is shipped to the local suppliers, from outside the State of California," together with footnote "7" thereof; on the ground that it is immaterial, irrelevant, incompetent, not probative of "commerce" under the Labor Management Relations Act, 1947, and does not tend to prove the burdening or obstruction of commerce directly and substantially.

2. Respondents except to that portion of the Findings of Fact, I (commencing I.R. last paragraph page 4 to Findings of Fact II) and particularly to that portion thereof reading as follows: "It is found that the Employer, H. W. Smith, doing business as A-1 Photo Service Company, is engaged in commerce within the meaning of the Act." (Findings of Fact, I, I.R. p. 5); on the ground that these are not supported by the evidence and are contrary to law.

3. Respondents except to all of the Findings of Fact, III, entitled "The Unfair Labor Practices,"

(I.R. pp. 5-10 inclusive); on the ground that they are contrary to, and not supported by the evidence, and are contrary to law.

4. Respondents except to the Findings of Fact, III, C Subsection 1 (c) entitled "The Respondent's Refusal to Bargain, in violation of Section 8 (b) (3) of the Act." (I.R. pp. 10-12 inclusive.)

5. Respondents except to Findings of Fact, IV, entitled "The Effect of the Unfair Labor Practices Upon Commerce," (I.R. p. 16); on a ground that they are contrary to the evidence and to law.

6. Respondents except to Conclusions of Law: 1, 6 and 7; (respectfully at I.R. pp. 16 and 17); on a ground that they are contrary and not supported by the evidence and contrary to and in violation of law.

7. Respondents except to the rulings of the Trial Examiner denying their motion to dismiss the Complaint. (Record—Report of Proceedings, pp. 36-55 inclusive.)

Therefore, Respondents urge that their exceptions herein set forth be sustained, and that in these respects, the Trial Examiner be reversed, and that the National Labor Relations Board do not adopt his recommendations.

September 9, 1948.

Respectfully submitted,

/s/ ALEXANDER H. SCHULLMAN,
Attorney for Respondents.

Affidavit of Service by Mail attached.

Acknowledged September 15, 1948.

[Title of Board and Cause.]

STATEMENT OF EXCEPTIONS

General Counsel hereby excepts to the Intermediate Report and Recommendation of the Trial Examiner in the above entitled matter as follows:

A. Generally

In that the Trial Examiner did not in accordance with Section 203.16 of the Rules and Regulations find that all allegations in the Complaint were admitted to be true and may be so found by the Board upon the failure of the Respondents to file an answer to the Complaint, as stated on page 2, line 26, of the Intermediate Report.

B. Specifically

General Counsel hereby excepts to the following portions of the Intermediate Report and Recommended Order:

Reference to Intermediate Report		
Page	Lines*	
11	36-42	To the finding that there is nothing in the record which casts doubt on the good faith of the Respondents because of their contention that the Act did not apply.

*Page and line numbers refer to original.

Page	Lines	
14	5-15	To the finding that it must be concluded that Respondents were authorized by the membership to act as they did.
Page	Lines	
14	21-25	To the finding and recommendation that the Complaint be dismissed insofar as it alleges that the Respondents' conduct in demanding a closed shop contract was violative of Section 8 (b) 1 A of the National Labor Relations Act.
		To the failure to find that Respondents' conduct was violative of Section 8 (b) 1 A of the National Labor Relations Act.
Page	Lines	
15	26-37	To the finding that Respondents' activity does not constitute a violation of Section 8 (b) 2 of the National Labor Relations Act.
Page	Lines	
16	6-14	To the finding that Respondents have not violated Section 8 (b) 2 of the National Labor Relations Act.
		To the recommendation that the Complaint be dismissed insofar as as it alleges that the Respondents' insistence upon a closed shop con-

tract constitutes a violation of Section 8 (b) 2 of the National Labor Relations Act.

To the failure to find Respondents' conduct violative of Section 8 (b) 2 of the National Labor Relations Act.

Page	Lines	
16	26-31	To the failure to find that Respondents' acts constituted violation of Section 8 (b) 1 A and 8 (b) 2, and failure to recommend that Respondents cease and desist from such activity.
Page	Lines	
17	25-27	(No. 8 of Conclusions of Law.) To the finding that Respondents have not engaged in unfair labor practices within the meaning of Section 8 (b) 1 A or Section 8 (b) 2 of the National Labor Relations Act.

To the failure to find that Respondents have engaged in unfair labor practices within the meaning of Section 8 (b) 1 A or Section 8 (b) 2 of the National Labor Relations Act.

Page	Lines	
17	35-43	(Recommendations, No. 1.) To the failure to recommend that Respondents cease and desist from en-

gaging in acts violative of Section 8 (b) 1 A and Section 8 (b) 2, more specifically, to cease and desist from restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, and from causing or attempting to cause an employer to discriminate against an employee in violation of subsection 8 (a) (3).

Appendix A

To the failure to include in Notice statement that Respondents will cease and desist from the acts described in Exception to that portion of the Intermediate Report and Recommended Order on Page 17, Lines 35-43.

ROBERT N. DENHAM,
General Counsel.

CHARLES K. HACKLER,
Chief Legal Officer,
Twenty-First Region.

/s/ EUGENE M. PURVER,
Attorney, National Labor
Relations Board.

September 24, 1948.

Received September 28, 1948.

United States of America
Before the National Labor Relations Board
In the Matter of:

LOCAL 905 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION (AFL), HASKELL TIDWELL, SECRETARY-TREASURER, AND ALBERT E. MORGAN, BUSINESS AGENT

and

H. W. SMITH, d/b/a A-1 PHOTO SERVICE.

Case No. 21-CB-34

DECISION AND ORDER

On July 19, 1948, Trial Examiner Isadore Greenberg issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents[1] had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in certain other alleged unfair labor practices, and recommended dismissal of

[1]At the hearing, the Trial Examiner dismissed the complaint with respect to Respondent Albert E. Morgan. Accordingly, the term "Respondents," as used herein, refers only to the Union and Haskell Tidwell.

these allegations of the complaint. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report and briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and finds merit in the Respondents' exceptions in the respects indicated below.

The record shows, as set forth in detail in the Intermediate Report, that the Employer, an individual, is sole proprietor of a retail store at San Pedro, California,[2] where he sells photographic equipment and supplies, greeting cards, and stationery. His only regular employees are three clerks. During the year ending March 31, 1948, the Employer purchased for his business merchandise valued at $100,146.69, approximately 44 per cent of which was purchased from wholesalers located outside the State of California and was delivered to him from points outside the State. The rest was purchased locally and, except for a small amount, was shipped to the Employer from within the State; a substantial amount, however, originated outside the State. The Employer's sales during the same period amounted to approximately $133,000. Except for merchandise valued at approximately

[2]The Employer also owns part of a store at Torrance, California; but only the San Pedro store is involved in this proceeding.

$2,600 sold and delivered to customers outside the State or to installations of the United States Army and Navy, all sales were made to retail customers within the State.

Upon these facts, which are not contested, the Trial Examiner concluded that the Employer was engaged in commerce within the meaning of the Act, and that the Respondents' activities had a close, intimate, and substantial relation to commerce and tended to lead to labor disputes burdening and obstructing commerce. It is clear to us, however, that the Employer's business is essentially local in nature and relatively small in size, and that the interruption of his operations by a labor dispute could have only the most remote and insubstantial effect on commerce. Recently, we have dismissed several proceedings involving such enterprises, on the ground that the assertion of jurisdiction would not effectuate the purposes of the Act.[3] The Respondents urge that we dismiss this proceeding for the same reason. The General Counsel, on the other hand, contends that once he has issued a complaint in an unfair labor practice case, the Board Members have no authority to decline to assert jurisdiction on policy grounds, if jurisdiction in fact exists. For the reasons given below, we find no merit in this contention.

Under Section 10 of the Act, as amended the

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[3]See, for example, Matter of Hom-Ond Food Stores, Inc., 77 N.L.R.B. 647; Matter of Sun Photo Company, 78 N.L.R.B. 1249; Matter of Walter J. Mentzer, 82 N.L.R.B., No. 39.

Board is "empowered" to prevent any person from engaging in any unfair labor practice "affecting commerce," but it is not directed to exercise its preventive powers in all such cases. From this, we believe it reasonable to infer, in the absence of any convincing evidence to the contrary,[4] that Congress intended the Board to continue to have discretionary authority to decline to exercise these powers in appropriate cases, as it had under the Wagner Act. The Board can now exercise this discretionary authority only by dismissing a complaint. We have therefore dismissed complaints—as we have declined to proceed with representation cases—when, in our opinion, the assertion of jurisdiction would not effectuate the policies of the Act.[5]

The General Counsel argues that the Board has no authority to take such action, claiming that: (1) the concept of discretion in the Board to assert or reject jurisdiction on policy grounds is incompatible with the General Counsel's "final authority," under Section 3 (d), over the issuance and prosecution of complaints; (2) it was judicially decided in the Jacobsen case[6] that the Board has an

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[4]Cf. Matter of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., 80 N.L.R.B., No. 91; Matter of Samuel Langer, 82 N.L.R.B., No. 132.

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[5]Matter of Walter J. Mentzer, supra.

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[6]Jacobsen v. N.L.R.B., 120 F. 2d 96 (C.A. 3), setting aside and remanding Matter of Protective Motor Service Company, 21 N.L.R.B. 552.

affirmative duty, once a complaint has been issued and a hearing held, to determine whether jurisdiction exists, and if it does exist, to determine the case on the merits; and (3) the separation of judicial and prosecuting functions under the amended Act precludes the Board from refusing to assert jurisdiction in complaint cases when jurisdiction in fact exists under the commerce clause.

It is true that the Board cannot itself issue a complaint; it cannot compel the General Counsel either to issue or refrain from issuing one; it cannot review his action in refusing to issue one.[7] Furthermore, the legislative history shows that Congress intended the General Counsel to exercise his authority to issue or refrain from issuing a complaint independently of any direction, control, or review by the Board. But after a complaint has issued and a hearing has been held, the "final authority" of the General Counsel is exhausted, and the case is then in the hands of the Board. Any action the Board may take thereafter, either as a matter of policy or on the merits, does not constitute a review of the General Counsel's "issuance" or "prosecution" of the complaint, but is the exercise of the Board's judicial powers under the Act. No judicial or quasi-judicial power has been vested in the General Counsel by statute. To argue that

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[7]Section 3 (d) provides, insofar as here relevant, that the General Counsel of the Board . . . shall have final authority . . . in respect of the . . . issuance of complaints under Section 10 and in respect of the prosecution of such complaints before the Board . . .

it has been, is to argue against the very theory of separation of functions which gave rise to congressional establishment of that independent office. He is to investigate and prosecute, but the Board is to judge.

Nor do we agree with the General Counsel's further contention that the decision in the Jacobsen case has relevance to the issue before us. In that case, the Board, although denying the charging parties' petitions to present additional evidence on interstate commerce, nevertheless dismissed the complaint on the ground that the facts set forth in the record were not sufficiently developed to afford a basis for determining whether the operations of the employer did affect commerce. The Court of Appeals for the Third Circuit remanded the case to the Board, saying:

* * * The Board, having issued its complaint and proceeded to hearings, had the duty to decide in limine whether or not the operations of the Protective Motor Service Company affected commerce within the meaning of the Act. * * *

This language may seem, at first glance, to lend some support to the General Counsel's position. But in the Jacobsen case the Board had not found that the assertion of jurisdiction would not effectuate the policies of the Act; consequently, the court did not have before it the question of the Board's authority to dismiss on that ground. Furthermore, the Jacobsen case arose under the Wagner Act, when, as the court noted, the Board in its discre-

tion could have refused to issue a complaint.[8] Even assuming, therefore, that that decision could properly be interpreted as holding that the Board had no authority to dismiss such a complaint for policy reasons, the same court might find it necessary to reach a different conclusion under the amended Act, which precludes the Board from exercising discretion at that early stage of the proceeding. Furthermore, the Supreme Court has indicated that in some circumstances, at least, the Board does have authority to dismiss a complaint on policy grounds. Thus, in the Indiana & Michigan Electric Company case,[9] also decided under the Wagner Act, it said:

The Board might properly withhold or dismiss its own complaint if it should appear that the charge is so related to a course of violence and destruction carried on for the purpose of coercing an employer to help herd its employees into the complaining union, as to constitute an abuse of the Board's process. (Emphasis supplied.)

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[8]The court said: It will be noted that the jurisdiction of the Board is not a compulsory jurisdiction. Assuming that all circumstances looked to by the Board are in existence, none the less we are of the opinion that the Board does not have to cause a complaint to be issued or proceed to prohibit any unfair labor practices complained of. The course to be pursued rests in the sound discretion of the Board and is the concern of expert administrative policy.

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[9]N.L.R.B. v. Indiana & Michigan Electric Company, 318 U. S. 9.

Finally, we find nothing in the amended Act, or in its legislative history, to support the General Counsel's contention that the separation of the judicial and prosecuting functions of the agency precludes the Board Members from exercising discretion to decline to assert jurisdiction if commerce is in fact affected. The separation of functions was accomplished by creating the statutory office of General Counsel, with the specific duties and authority set forth in Section 3 (d). In other respects, the powers possessed by the Board under the Wagner Act, insofar as here relevant, remain unchanged. In our opinion, Section 3 (d) cannot be interpreted to oust the Board of power to determine its own policies for effectuating the purposes of the Act.

Nothing in the Act or the legislative history indicates that the Congress concluded that only the General Counsel had the wisdom to determine what would and what would not effectuate the stautory policy. It is clear that the General Counsel alone was to exercise discretion as to the issuance of complaints, but it is equally clear that the General Counsel's judgment was not to control the Board at the decisional stage of any proceeding. Separation of functions was evidently intended to bar judges from being "prosecutors"; surely Congress was not seeking, by the same provision, to convert prosecutors into judges.

For the above reasons, we find, contrary to the

General Counsel's contention, that the Board has discretionary authority to dismiss complaints for policy reasons, even though commerce is affected.[10] Moreover, we believe that, in the absence of special circumstances, it is a proper exercise of such discretion to dismiss cases in which, as here, the business involved is so small and so local in nature that the interruption of operations by a labor dispute could have only a remote and insubstantial effect on commerce. We shall therefore dismiss this complaint in its entirety.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against the Respondents, Local 905 of the Retail Clerks International Association (AFL) and Haskell Tid-

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[10]The Board has likewise dismissed unfair labor practice allegations for policy reasons in other circumstances: for example, on the ground that the charging party had not attempted to utilize the machinery established by a collective bargaining contract (Matter of Consolidated Aircraft Corp., 47 N.L.R.B. 69); or that the respondent had abided by a proper settlement agreement (Matter of Godchaux Sugars, Inc., 12 N.L.R.B. 568; Matter of Wickwire Brothers, 16 N.L.R.B. 316; Matter of Midwest Piping and Supply Co., Inc., 63 N.L.R.B. 1060, 1074). Similarly, the Board has sometimes followed the administrative practice of issuing no findings or order where a respondent complied with the recommendations of an Intermediate Report to which no exceptions were filed.

well, Secretary-Treasurer, be, and it hereby is, dismissed.

Signed at Washington, D. C., this 13th day of May, 1949.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

JAMES J. REYNOLDS, JR.,
Member.

ABE MURDOCK,
Member.

J. COPELAND GRAY,
Member.

[Seal] NATIONAL LABOR RELATIONS BOARD.

[Title of Board and Cause.]

MOTION OF GENERAL COUNSEL FOR RECONSIDERATION BY THE BOARD OF ITS DECISION AND ORDER.

Now comes the General Counsel and moves the Board to reconsider its Decision and Order in the above-entitled proceeding.

On May 13, 1949, the Board issued its order dismissing the complaint in the above-captioned proceeding. The rationale of the Board's decision in

support of its order raises questions of major importance in the administration of the Act and plainly requires the Board to re-examine the position expressed in its opinion. The General Counsel submits the Board erred in holding that:

I. Despite the proper issuance of the complaint by the General Counsel pursuant to administrative discretion vested by statute in him exclusively, the Board, in the exercise of its judicial functions, and as a judicial function, has statutory authority to overrule the administrative decision of the General Counsel that a complaint should issue, and, in its judicial capacity, to refuse to exercise its jurisdiction over the case, where such jurisdiction exists in fact.

II. The authority of the Board to decline to exercise such jurisdiction rests in a statutory grant to the Board of discretionary authority to take such measures as will, in its opinion, effectuate the policies of the Act.

In support of this motion, the General Counsel shows as follows:

I.

The Board does not, by virtue of its judicial functions, possess a discretion denied both to the Courts and to other administrative agencies charged with judicial or quasi-judicial duties.

In matters pertaining to questions concerning representation, the Board acts solely and only as an administrative body. All its decisions, findings, and directions in the representation field are ad-

ministrative acts, exercised by virtue of and pursuant to the administrative functions of the Board. As such, they are not subject to appeal or to review by any court, except as specifically provided in the Act when they are integrated with the issues in an unfair labor practice charge brought under Section 8 (a) (5).

The administrative powers and authorities of the Board, granted by the Act, and not conferred on the General Counsel either by the language of the statute or under the Delegation of Authority dated August 21, 1947, are limited to the field of matters concerning questions of representation. In that field, no contention is made that any limit is placed on the Board's exercise of administrative discretion to "effectuate the policies of the Act," so long as such discretion is not abused or capriciously exercised.

In the field of unfair labor practices, however, the statute has made it clear that administrative discretion has been withdrawn from the Board with reference to the disposition of unfair labor practice charges or complaints. Administrative disposition of unfair labor practice charges has become one of the functions of the General Counsel. It is his administrative discretion alone that determines whether, and when, and on what principle a complaint will issue—and inherent in that, is the exclusive duty to determine whether the prosecution of the charge would effectuate the policies of the Act. In short, the General Counsel determines—

first: whether jurisdiction, in his opinion, does in fact lie; and second: whether the policies of the Act will be effectuated by prosecuting the charge.

In its decision here, the Board concedes that it cannot reach out and cause a complaint to issue where the General Counsel has determined that it should not issue—whether such determination be based on policy or on the factual merits; but, says the Board, as a part of our judicial functioning, we can administratively determine that the affirmative administrative determination of the General Counsel is within our reach, and that regardless of the factual merits, and conceding the case is within the jurisdictional area of the Agency, we can review and reverse such administrative decision of the General Counsel, in the exercise of our judicial functions, and refuse to consider the issues, no matter how meritorious they may be between the parties and under the law.

The reasoning set out in the Board's opinion in this case writes into the provisions of the Act, features that not only are not there, but provisions that the legislative history clearly points out, were intentionally omitted. Whether, under the Wagner Act, the Board had a broader discretion, is hardly material now, for the facts and the basic structure of the law have completely changed. Under the Wagner Act, the Board was the only place where administrative discretion as to whether prosecution would effectuate the policies of the Act, could be exercised. Here, that is not true.

From the legislative history of the Taft-Hartley Act, comes the conclusion that Congress was not entirely satisfied with the arrangement that combined that administrative and prosecuting function with the duty to determine judicially (1) whether jurisdiction, in fact, exists; (2) whether the facts indicate that an unfair labor practice has, in fact, been committed, and (3) what, if anything, should be required to be done by the parties, as a means of effectuating the policies of the Act, by way of remedying the situation. Sections 3 (d) and 4 (a) of the present law provide the answer to that, by taking it away from the Board, giving it exclusively to the General Counsel, and, insofar as unfair labor practices are concerned, making the Board into a court with all its duties in that field confined to the judicial functions.

In its decision in this case, the Board has failed to note that there is a broad line of demarcation between administrative disposition of cases, which may turn on pure policy regardless of factual merit and are not reviewable, and decisions arising from the exercise of the judicial functions, in which the reason for the determination must rest on a sound legal or factual base.

Notwithstanding the Board's statement to the contrary, the decision reached in this case is not arrived at in the exercise of a judicial function, for it admittedly disregards the legal or factual issues in a case that rests within the Agency's statutory jurisdiction. It is bottomed entirely on an

erroneous assertion of power to decline jurisdiction where jurisdiction exists in fact, on the theory that any action taken by the Board subsequent to the issuance of the complaint "either as a matter of policy or on the merits * * * is the exercise of the Board's judicial powers under the Act."

It is true, as the Board indicates, that the respective roles of the Board and the General Counsel are analogous to those of judge and prosecutor in other branches of the law. Nor is it denied that once the General Counsel has issued his complaint, the Board, like a court, has both the authority and the duty to interpret and apply the statute, and may, in the fulfilment of that duty arrive at conclusions contrary to those of the General Counsel. But assuming, arguendo, the accuracy of the Board's analogy, the exercise of judicial or quasi-judicial functions does not carry with it any inherent power to decline to exercise an existent jurisdiction.

To the contrary, the very fact that the Board admittedly is functioning in its judicial capacity, prevents it from declining to decide the merits of a case properly before it. A prosecutor may well decide that to issue a complaint in a particular case would not effectuate the public policy, as the Board in its decision admits, but once he has brought the case to court, the court cannot decline to decide it. The duty resting on those exercising judicial power to exercise their jurisdiction has been uniformly recognized since it was given classic expression by

Chief Justice Marshall, speaking for the Court, in Cohens v. Virginia, 6 Wheat. 264, 404:

It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. (Emphasis added.)[1] Particularly relevant here since the Board declined to act in the instant case because "The business in-

[1]See also Meredith v. Winter Haven, 320 U.S. 228, 234: "jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience," and note the observation of the Court of Appeals for the Fourth Circuit that "The right of a party litigant to the judgment of a court upon a matter properly before it is a fundamental aim of the law." United States v. 1 Dozen Bottles, 146 F. 2d 361, 363.

volved is so small and so local in nature," is the decision in Willcox v. Consolidated Gas Co., 212 U.S. 19, 40, that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * * That the case may be one of local interest only is entirely immaterial." (Emphasis added.)

The necessary implication in the Board's decision is that because it has some judicial authority, it also has inherent power to substitute its conception of public policy for the specific duties imposed upon it by statute. This claim is similar to that occasionally advanced by judges of inferior federal courts but rejected by reviewing tribunals. Thus in United States v. Wingert, 55 F. 2d 960 (E. D. Pa.), a district court, following an indictment, declined to issue a bench warrant for the arrest of the person indicted, claiming that such refusal lay within its judicial discretion. The Supreme Court thereupon issued a writ of mandamus commanding the district court to issue the warrant, and noting that the authority to issue the warrant does not "carry with it the power not to do so under the guise of judicial discretion; * * * the power to enforce does not inherently beget a discretion permanently to refuse to enforce," Ex parte United States, 287 U.S. 241, 250. (Emphasis added.)

The Board's determination that to assert existing statutory jurisdiction would not effectuate the policies of the Act is similar to the "considerations of humanity and public well-being" which had led inferior federal courts, prior to the Probation Act, to suspend sentences imposed in certain criminal

cases. Ex parte United States, 242 U.S. 27, 51. But in that case the Supreme Court, at p. 42, expressly disapproved the proposition that "the power to enforce begets inherently a discretion to permanently refuse to do so" and held that the action of the court below "amounts to a refusal by the judicial power to perform a duty resting upon it" Idem at p. 52. In language fully applicable to the Board, the Court pointed out that "to enable courts to meet by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment, recourse must be had to Congress whose legislative power on the subject is in the very nature of things completely adequate." Idem.[2]

Thus, it is not open to question that a judicial body is not free to decline jurisdiction vested in it or to escape duties imposed upon it by law. And administrative agencies, insofar as they exercise judicial functions, stand on no better footing. I.C.C. v. Humboldt S. S. Co., 224 U.S. 474, 489; Louisville Cement Co. v. I.C.C., 246 U.S. 638; U.S. ex rel CG.W.R. Co. v. I.C.C., 294 U.S. 50, 60, 61; Jacobsen v. N. L. R. B., 120 F. 2d 96 (C. A. 3).[3] That

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[2]Congress responded by passing the Probation Act, conferring the necessary discretionary authority theretofore lacking.

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[3]The Board concedes that there is language in the Jacobsen case supporting the contention that the Board is under a duty, once a hearing has been held, to determine the existence of jurisdiction and

administrative discretion does not extend to the refusal of jurisdiction "plainly and palpably" created by Congress is the clear import of the C.G.W.R. Co. case (at p. 61) and the other cases cited immediately above.

II.

The Board may not exercise a discretion to decline to exercise an existent jurisdiction unless such discretionary power is expressly granted

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if it exists to decide the case on the merits. It denies that the Jacobsen case is relevant to the issue herein asserting that

> The Jacobsen case arose under the Wagner Act, when, as the court noted, the Board in its discretion could have refused to issue a complaint. [footnote omitted] Even assuming, therefore, that that decision could properly be interpreted as holding that the Board had no authority to dismiss such a complaint for policy reasons, the same court might find it necessary to reach a different conclusion under the amended Act, which precludes the Board from exercising discretion at that early stage of the proceeding.

In other words, the Board admits that Congress intended to strip it of discretionary authority over the issuance of complaints and then argues that as a result of such stripping the Board necessarily acquired similar authority at a later stage at which it had not previously (under the Wagner Act) possessed it. But the Board points to nothing in the amended Act which compels such a conclusion. Moreover, the Board's admission that all it is exercising here is the authority it once held to refuse to issue a complaint stands in contrast to its denial that it is usurping a function of the General Counsel, and to its insistence that it is exercising a purely judicial function.

by the statute or may be reasonably inferred therefrom.

It has been shown that the Board does not, merely by virtue of its quasi-judicial functions, possesses an inherent power to refuse to exercise an existent jurisdiction. Such a power must be found, if at all, solely in the provisions of the statute administered by the Board, the statute to which the Board owes its creation and continued existence.[4] In creating the Board, Congress established an agency which, like the Federal Trade Commission "is charged with the enforcement of no policy except the policy of the law" and was "created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." Humphrey's Executor v. United States, 295 U.S. 602, 624, 628. As Judge Jerome Frank, then Chairman of the S.E.C., speaking for the Commission, stated:

The suggestion * * * that Section 20 [of the Public Utility Holding Company Act of 1935] authorizing us to make orders to effectuate the policies of the Act, would justify a denial by order of an exemption granted by a pre-existing and valid rule must be rejected * * * The order-making authority under Section 20 may be used only to implement

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[4]As indicated hereinafter, the Board does assert that the power claimed is to be found in a specific provision of the amended Act. It does not assert any other statutory basis for its claim, nor does it point to any judicial authority confirming such power independently of statute.

an existing standard imposed by statute or valid rule. Just as the order-making power under that section could not properly be used to abrogate standards not imposed by the statute itself so it may not be used to abrogate standards imposed by valid rules which have the force and effect of law. Matter of Consumers Power Co., Pike and Fischer, Admin. Law, 33 F. 11-4n. (6 S.E.C. 444).[5]

III.

No provision of either the National Labor Relations Act, as amended or any other statute, confers on the Board a discretion to refuse to exercise an existent jurisdiction.

In its decision, the Board does attempt to find a statutory basis for its refusal to exercise jurisdiction where such jurisdiction exists in fact. It points to Section 10 of the amended Act as conferring the alleged authority, and then proceeds to ignore all the provisions of that Section except the first sentence of subsection (a) thereof. That first sentence reads as follows:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce (emphasis added).

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[5]Judge Frank went on to say: "If the Commission intended to proceed by an ad hoc inquiry in each case, the promulgation of the exemptive rule was not merely unnecessary; it was misleading. It is impossible to believe that Congress, or the Commission when it promulgated the rule, intended the suggested anomalous procedure to be followed. Idem.

In construing the quoted provision the Board argues that it is merely "empowered" to prevent unfair labor practices affecting commerce, "but it is not directed to exercise its preventive powers in all such cases." From this it infers "that Congress intended the Board to continue to have discretionary authority to decline to exercise these powers in appropriate cases,"[6] notwithstanding the language of Section 3 (d) describing the exclusive authority of the General Counsel. Thus, the Board having pointed to Section 10 as the source of its claimed discretionary authority, ignores all but the first sentence of the section, and does so despite the specific prescription therein that the prevention of unfair labor practices is to be accomplished in accordance with all the provisions of Section 10. For Section 10, which is specifically entitled "Pre-

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[6]The Board does not assert that its alleged discretionary power to decline to exercise an existent jurisdiction is authorized by the provision in Section 10 (c) which states that the Board is "to take such affirmative action . . ., as will effectuate the policies of this Act." As the General Counsel has clearly shown in his Substituted Supplemental Brief (pp. 5-6) submitted to the Board prior to its issuance of the instant decision and order, the quoted language does not confer a general discretion on the Board to require any action which "will effectuate the policies of the Act" such as would support a claim to authority to refuse to assert jurisdiction on policy grounds. It merely provides an added tool to supplement the mandatory cease and desist order and the power it confers is limited to cases in which the Board has already determined that unfair labor practices have occurred.

vention of Unfair Labor Practices," establishes a complete and integrated statutory scheme for the prevention of such practices. No part or provision of that section may properly be read in isolation from the remainder thereof as the language of the first sentence of subsection (a) itself, quoted above, and the long-familiar rules of statutory construction make abundantly plain. Helmich v. Hellman, 276 U.S. 233, 237; Wilson v. Rousseau, et al. 145 U.S. 646, 677; Puerto Rico v. Shell Co., 302 U.S. 253, 258; United States v. American Trucking Ass'ns, 310 U.S. 534, 542-544; United States v. Cooper Corporation, 312, U.S. 600, 607; Pennington v. Coxe, 6 U.S. 33, 52; Iglehart v. Iglehart, 204 U.S. 478, 484-485; Gayler et al. v. Wilder, 51 U.S. 476, 495; Market Co. v. Hoffman, 101 U.S. 112, 115-116; Browne v. Duchesne, 60 U.S. 183, 194.

The General Counsel respectfully submits that the Board, in construing the first sentence of Section 10 (a) as the source of its claimed discretionary authority, has utterly misapprehended its true meaning. That sentence, read in the context of Section 10 as a whole, does not authorize the Board in its discretion to decline to exercise its power to prevent unfair labor practices affecting commerce. It is limiting and restrictive language. It simply constitutes the grant of the Board's jurisdiction and the limits thereof in exactly the same manner as does any legislative grant of limited jurisdiction to an administrative agency or inferior judicial tribunal. It is not, as the Board asserts, permissive rather than mandatory in character. The choice of the allegedly permissive word "empowered"

rather than a mandatory term such as "shall" was clearly dictated by the need for incorporating the provisions of subsection (b) into Section 10 without thereby contradicting the provisions of subsection (a).

Section 10 (b) as the Board concedes, confers a discretionary power upon the General Counsel to issue or refrain from issuing a complaint independently of any control or review by the Board.[7] Thus, if Section 10 (a) had in express language directed the Board to prevent all unfair labor practices affecting commerce, such a prescription would be rendered nugatory in those situations in which, under Section 10 (b), there had been an unreviewable refusal to issue a complaint and hence an impossibility of preventive action by the Board. Clearly therefore, the choice of language in the first sentence of Section 10 (a) does not compel an inference that it represents anything more than a grant and delimitation of the Board's jurisdiction, and its allegedly permissive form is nothing more than the means by which the Congress prevented subsections (a) and (b) from contradicting each other.

This conclusion is overwhelmingly corroborated

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[7]No issue is raised herein concerning the Board's discretionary power under the original Wagner Act, to decline to exercise an existent jurisdiction. Decisions under the original Act that the Board could in its discretion dismiss its own complaint which it alone had authority to issue are hardly relevant under the amended Act which was passed, inter alia, precisely with the objective of eliminating the Board's power over the issuance of complaints.

by the Congressional choice of language in subsection (c) which carries forward to the decisional stage the statutory scheme of Section 10 for the prevention of unfair labor practices. In this subsection the language is unambiguously mandatory. It provides that if, after a hearing the Board is of the opinion that unfair labor practices have been committed "The Board shall state its findings of fact[8] * * * and shall issue an order requiring such person to cease and desist from such unfair labor practice" (emphasis added). Clearly, a Congressional intent that the provisions of the first sentence of Section 10 (a) are genuinely permissive rather than mandatory could have been easily manifested by framing Section 10 (c) in language consistent with such intent. For example, if the relevant provisions of Section 10 (c) had read that the Board is "empowered" or "shall have power" to state it findings of fact and to issue cease and desist orders, the Board's assertion of the discretionary character of the authority allegedly conferred upon it by Section 10 (a) might have been more persuasive. To accept the Board's construction of the statute in this respect would be to nullify the inte-

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[8]See Jacobsen v. N.L.R.B., 120 F. 2d 96, 101 (C.A. 3) where the court held that the Board had the duty to decide whether the operations of the employer affected commerce, and in the words of the court remanding the cause

. . . and if it be found that the operations of [the employer] do affect commerce within the purview of the Act, to determine whether or not that company has engaged in unfair labor practices and to issue an appropriate order in respect thereto.

grated statutory scheme for the prevention of unfair labor practices established by Section 10, and hence should be avoided. United States v. Raynor, 302 U.S. 540, 547. See also McDonald v. Thompson, 305 U.S. 263, 266; United States v. American Trucking Ass'ns, supra at 544.

The General Counsel makes no claim to a right or desire to invade the judicial field of the Agency which is the Board's exclusive bailiwick. And like the Board, he does not believe it was the intent of Congress that the prosecutor should attempt to get over into that area any more than it was the intent of Congress that the judicial branch of the Agency should attempt to usurp those functions intended to be performed by the prosecutor and administrator.

The General Counsel does, however, assert that the policy and limitations and means to effectuate those things are to be found solely in the provisions of the Act and other related legislation enacted by the Congress—and that they are not to be found in some unidentified region where they carry on a mysterious existence independent of the statute that gave them being.

The General Counsel recognizes that the Congress has imposed a joint obligation on him and the Board, to carry out the prescriptions of the Act, and in so doing, to effectuate its policy. It is his desire here to emphasize the coordinate character of that obligation, but in so doing, he must conform to the duties, obligations, and responsibilities fixed on him by the specific language of the Act and by

the only reasonable inferences to be drawn therefrom.

/s/ ROBERT N. DENMAN,
General Counsel.

June 16, 1949.

United States of America
Before the National Labor Relations Board
Case No. 21-CB-34

In the Matter of:

LOCAL 905 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION (AFL), HASKELL TIDWELL, Secretary-Treasurer, and ALBERT E. MORGAN, Business Agent,

and

H. W. SMITH, d/b/a A-1 PHOTO SERVICE.

ORDER DENYING MOTION

The Board having, on May 13, 1949, issued a Decision and Order in the above-entitled proceeding, and thereafter, the General Counsel for the National Labor Relations Board having filed a Motion for reconsideration of the aforesaid Decision and Order,

It Is Hereby Ordered that the said Motion be, and it hereby is, denied for reasons stated in the said Decision and Order.

Dated, Washington, D. C., June 30, 1949.

By direction of the Board:

/s/ FRANK M. KLEILER,
Executive Secretary.

GENERAL COUNSEL'S EXHIBIT No. 1

NLRB 508
(10-20-47)

United States of America
National Labor Relations Board
Amended Charge Against Labor Organization
or Its Agents

1. Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that .....

.....

(Name of labor organization or its agents.)

.....at .....

has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8(b) subsections ..... of said Act, in that: (Recite in detail in paragraph 2 the basis of the charge. Be specific as to names, addresses, plants, dates, places, and other relevant facts.)

2. .....

.....

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

3. Name of Employer: H. W. Smith d/b/a A-1 Photo Service.

4. Location of plant involved: 1306 S. Pacific Ave., San Pedro, Cal.; Employing 5.

5. Nature of business.....

Exhibit No. 1—(Continued)

6. (Paragraphs 6, 7, and 8 apply only if the charge is filed by a labor organization.) The labor organization filing this charge, hereinafter called the union, has complied with Section 9(f)(A), 9(f)(B)(1), and 9(g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number..... The financial data filed with the Secretary of Labor is for the fiscal year ending..... A Certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

7. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.

8. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9(f), (g), and (h) of the Act.

H. W. Smith d/b/a A-1 Photo Service.

1306 S. Pacific Avenue, San Pedro, California, TErminal 2-1787.

By /s/ JOHN BAILEY,
Attorney.

Case No. 21-CB-34.

Date filed 4-5-48.

9(f), (g), (h) cleared.....

Subscribed and sworn to before me this 5th day of April, 1948, at Los Angeles, Calif., as true to the best of deponent's knowledge, information and belief.

/s/ EUGENE M. PURVER,
Board Agent.

(Submit Original and Four Copies of This Charge)

United States of America, Before the National Labor Relations Board, Twenty-first Region

Case No. 21-CB-34

In the Matter of:

LOCAL 905 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION (AFL), HASKELL TIDWELL, Secretary-Treasurer, and ALBERT E. MORGAN, Business agent,

and

H. W. SMITH, d/b/a A-1 PHOTO SERVICE.

COMPLAINT

It having been charged by H. W. Smith, d/b/a A-1 Photo Service, hereinafter called the Employer, that Local 905 of the Retail Clerks International Association (AFL), hereinafter called Local 905,

Exhibit No. 1—(Continued)

Haskell Tidwell, Secretary-Treasurer of Local 905, and Albert E. Morgan, Business Agent of Local 905, have engaged in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101—80th Congress, First Session, hereinafter called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-First Region, designated by the Board's rules and regulations, Series 5, Section 203.15, hereby issues this Complaint and alleges as follows:

I.

H. W. Smith, d/b/a A-1 Photo Service, with his principal place of business at San Pedro, California, is now and at all times material herein, has been continuously engaged at said location in San Pedro, California, in the business of photo finishing and the sale and distribution of photographic equipment, supplies, accessories and various printed products.

II.

The Employer, in the course and conduct of his business, as aforesaid, causes and has continuously caused a substantial amount of equipment, materials, supplies and printed products to be acquired, purchased, transported and delivered in interstate

Exhibit No. 1—(Continued)

commerce from and through states of the United States other than the State of California to the Employer's place of business in San Pedro, California, and has continuously for a long period of time caused quantities of his finished products to be transported in interstate commerce from his place of business in San Pedro, California, to and through states of the United States other than the State of California.

III.

The Employer is, and at all times material herein, has been engaged in commerce within the meaning of the Act.

IV.

Local 905 of the Retail Clerks International Association (AFL) is a labor organization within the meaning of Section 2, Subsection 5, of the Act.

V.

Haskell Tidwell is Secretary-Treasurer of Local 905 of the Retail Clerks International Association (AFL).

VI.

Albert E. Morgan is business agent of Local 905 of the Retail Clerks International Association (AFL).

Exhibit No. 1—(Continued)

VII.

All clerical employees excluding supervisory employees employed by the Employer at his place of business in San Pedro, California, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, Subsection (b) of the Act in order that the employees of the Employer may have the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the Act.

VIII.

On and before November 1, 1947, all of the employees employed by the Employer in the unit described in Paragraph VII above designated Local 905 as their representative for the purposes of collective bargaining with the Employer.

IX.

At all times since November 1, 1947, Local 905 has been the representative for the purposes of collective bargaining of a majority of the employees of the Employer in the unit described in Paragraph VII above and by virtue of Section 9, Subsection (a) of the Act has been and is now the exclusive representative of all the employees of the Employer in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

Exhibit No. 1—(Continued)

X.

Local 905, although duly requested by the Employer, has at all times since on or about November 1, 1947, refused and continues to refuse to bargain collectively in good faith with the Employer in respect to rates of pay, wages, hours of employment or other conditions of employment of the employees of the Company in the unit set forth in Paragraph VII above.

XI.

Local 905, its officers, agents, organizers and representatives, respectfully and specifically including but not limited to Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, from on or about November 1, 1947, and continuously down to and including the date of issuance of this Complaint, restrained, coerced and are restraining and coercing employees of the Employer in the exercise of the rights guaranteed in Section 7 of the Act by:

(1) Refusing to bargain collectively in good faith with the Employer as alleged in Paragraph X.

(2) Attempting to impose and imposing upon employees of the Employer certain conditions of employment requiring said employees as a condition of employment to obtain and maintain membership in Local 905 in contravention of the Act.

Exhibit No. 1—(Continued)

XII.

Local 905, by its officers, agents, organizers and representatives, respectively, and specifically but not limited to Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, from on or about November 1, 1947, and continuously down to and including the date of the issuance of this Complaint, has attempted and continues to attempt to cause the Employer to discriminate against its employees by insisting and seeking to compel the Employer to establish and maintain a closed shop and thus require all the employees within the bargaining unit of which Local 905 is the collective bargaining representative to be and remain members of Local 905 as a condition of employment.

XIII.

Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, by their refusal to bargain collectively in good faith with the Employer as described in Paragraphs X, XI, and XII above, did thereby engage in and are thereby engaging in unfair labor practices within the meaning of Section 8, Subsections (b) (1) (A) and (3) of the Act.

XIV.

Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, by the acts

Exhibit No. 1—(Continued)

and conduct described in Paragraphs X, XI, XII and XIII above, did thereby engage in and are thereby engaging in unfair labor practices within the meaning of Section 8, Subsections (b) (1) (A) and (2) of the Act.

XV.

The activities of Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, as described in Paragraphs X, XI, and XII above, and each of them, appearing in connection with the operations of the Employer as described in Paragraphs I, II and III above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XVI.

The aforesaid acts of Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, and each of them, as hereinabove set forth, constitute unfair labor practices affecting commerce within the meaning of Section 8, Subsections (b) (1) (A), (2) and (3) and Section 2, Subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board on behalf of the Board, by the Acting Regional Director for the 21st Region,

Exhibit No. 1—(Continued)

on this 7th day of April, 1948, issues this Complaint against Local 905 of the Retail Clerks International Association (AFL), Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, Respondents herein.

[Seal] /s/ DANIEL J. HARRINGTON,
Acting Regional Director, National Labor Relations Board, Twenty-First Region.

[Endorsed]: No. 12446. United States Court of Appeals for the Ninth Circuit. H. W. Smith, doing business as A-1 Photo Service, Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition for Review of Order of the National Labor Relations Board.

Filed February 14, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12446

H. W. SMITH, d/b/a A-1 PHOTO SERVICE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION TO REVIEW ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

H. W. Smith, an individual, respectfully petitions this Honorable Court for a review of a certain order entered on May 13, 1949, by the National Labor Relations Board (hereinafter referred to as the "Board") in a proceeding instituted by it against Local 905 of the Retail Clerks International Association, A. F. of L., Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, appearing and designated upon the records of the Board as "In the Matter of Local 905 of the Retail Clerks International Association, A. F. of L., Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, and H. W. Smith, d/b/a A-1 Photo Service, Case No. 21-CB-34."

In support of this petition, your petitioner respectfully shows:

I.

Jurisdiction of the Court

Your petitioner is and at all times herein mentioned was an individual doing business as A-1 Photo Service in the City of San Pedro, County of Los Angeles, State of California, at which place the unfair labor practices hereafter mentioned were committed, the same being within this circuit.

Petitioner on April 5, 1948, filed with the Regional Office of the National Labor Relations Board, Twenty-first Region, an amended charge alleging that the respondents in the above-mentioned matter had engaged in, and were engaging in, unfair labor practices affecting commerce under section 8(b)(1)(A), (2) and (3) and section 2(6) and (7) of the Labor Management Relations Act, 1947 (hereinafter referred to as the "Act"). The General Counsel of the Board, by the Acting Regional Director, Twenty-first Region, thereafter, pursuant to the final authority vested in him by section 3(d) of the Act, issued a complaint on April 7, 1948, against the said respondents in the above-mentioned matter alleging the matters contained in said charge. After hearing before a trial examiner on April 21, May 3, and May 4, 1948, and after transfer of the matter to the Board, by its order dated July 27, 1948, the said Board on May 13, 1949, issued the above-mentioned order dismissing the complaint, thereby denying to petitioner in whole the relief sought.

By reason of the above-mentioned matters, this

Court has jurisdiction of this petition by virtue of section 10(f) of the Labor Management Relations Act, 1947 (29 U.S.C.A. Sec. 160(f).)

II.

Facts and Pleading

The aforementioned charge filed by petitioner with the Regional Office, Twenty-first Region, of the National Labor Relations Board and the complaint issued pursuant thereto by the General Counsel of the Board alleged that the respondent union had been since before November 1, 1947, the duly designated collective bargaining representative of the petitioner's clerical employees, who constituted a unit appropriate for collective bargaining; that respondent union had at all times since November 1, 1947, refused to bargain collectively in good faith with petitioner though requested by petitioner to so bargain; that the respondent union and the individual respondents in said matter had since said date restrained and coerced employees of petitioner by said refusal to bargain and by further attempting to impose upon employees the requirement that they obtain membership in respondent union as a condition of employment; that all respondents had since said date attempted to cause petitioner to discriminate against his employees by seeking to compel petitioner to effect and maintain a closed shop. The complaint further alleged that petitioner was and is engaged in the business of photo finishing and the sale of photographic equip-

ment and supplies and causes a substantial amount of such merchandise to be transported and delivered to him in interstate commerce and likewise causes quantities of his finished product to be transported to his customers in interstate commerce and was, therefore, engaged in commerce within the meaning of the Act.

The findings of fact by the Trial Examiner were to the effect that during the period of April, 1947, to March, 1948, petitioner purchased merchandise of a value of $100,146.69 of which amount $44,406.63 was purchased outside the State of California and delivered to petitioner's store in San Pedro, California, in interstate commerce; that the rest of the merchandise purchased, of a value of $55,740.06 was purchased from sellers located in the State of California, most of which was delivered to petitioner from within the State of California; that a small portion of the latter purchases were shipped to petitioner from points outside the State of California; that of the merchandise delivered to petitioner from within California, a substantial portion originated from outside the State of California; that during the calendar year of 1947 petitioner's sales at his San Pedro store totaled $133,715.51; that all of said sales were sold and delivered to customers within the State of California except that merchandise valued at $600 was delivered to customers outside said State and merchandise valued at approximately $2400 was sold and delivered to installations of the United States mili-

tary and naval services; that petitioner is engaged in interstate commerce within the meaning of the Act; that the unfair labor practices of the respondents have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

With respect to the unfair labor practices charges, the Trial Examiner recommended: that the complaint be dismissed in so far as it alleged that respondent's conduct is demanding a closed shop contract was violative of section 8(b)(1)(A) of the Act; that the complaint be dismissed in so far as it alleged that the respondents named therein by insisting upon a closed shop contract had violated section 8(b)(2) of the Act; that the respondent union and respondent Tidwell refused to bargain collectively with petitioner in violation of section 8(b)(3) of the Act. Upon motion, the complaint was dismissed as to respondent Albert E. Morgan.

The Trial Examiner thereupon recommended that the remaining respondents named in said matter be ordered to cease and desist from refusing to bargain collectively with petitioner and to take certain affirmative action, that is, to bargain with petitioner upon his request and to post notices.

The Board, without giving consideration to the Trial Examiner's findings that the respondents named in said matter had committed unfair labor practices, and though agreeing with the Trial Ex-

aminer's finding that the petitioner's business constituted engagement in interstate commerce within the meaning of the Act, nevertheless held that it had the discretion to not accept such existing jurisdiction, and in the exercise of such asserted discretion, dismissed the complaint in its entirety on the grounds that "the assertion of jurisdiction would not effectuate the purposes of the Act." If the said dismissal was not upon that ground, then the Board did not disclose upon what ground the said dismissal was entered. Thereupon, the Board, on May 13, 1949, issued the order herein complained of, which was as follows:

"Order

"Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against the Respondents, Local 905 of the Retail Clerks International Association, A. F. of L., and Haskell Tidwell, Secretary-Treasurer, be, and it hereby is, dismissed."

The Board, in holding that it had the discretion to decline an admittedly existing jurisdiction, and in entering the aforementioned order upon such holding, committed error, in that the Board does not have discretion to decline such existing jurisdiction once a complaint has issued on the matter and the Board has taken jurisdiction thereof, all

of which was urged to the Board without avail. If the said decision and order was not on such ground, then the Board committed error in that it did not reveal, as it is obligated in law to do, the grounds upon which it acted and based its order.

The order of the Board adversely and irreparably affects, damages and aggrieves petitioner in that petitioner was thereby denied in whole the relief sought by the amended charge filed by him on April 5, 1948, as narrated above, and petitioner alleges that he is further aggrieved by the above-mentioned order of the Board in that the respondents in the proceedings before the Board are still the representatives of the employees of petitioner, and such respondents and representatives are still insisting that petitioner give effect to a closed-shop agreement which is invalid under the Act, and in that petitioner cannot determine from the decision and order of the Board whether the said Act is applicable to him or whether he may or may not properly execute and give effect to such agreement; and petitioner is further aggrieved by the said order of the Board in that it fails to prohibit the said respondents from engaging in conduct toward petitioner which is declared by the Act to be illegal.

Wherefore, H. W. Smith petitions this Honorable Court for a review of the aforementioned order entered by the Board in the aforementioned proceedings and your petitioner Respectfully Prays:

1. That the Board be directed to certify and deliver to this Honorable Court, or to petitioner, a transcript of the entire record in the aforementioned proceeding before the Board.

2. That the aforesaid order of the Board be set aside and the matter be remanded to the Board with instructions to accept jurisdiction if it exists in fact, to decide the matter upon its merits, and, if it finds that the said unfair labor practices were committed, to order the cessation and termination of such unfair labor practices and to give such further relief as will effectuate the policies of the Act.

Dated: December 30, 1949.

Respectfully submitted,
H. W. SMITH,
Doing Business as A-1 Photo Service,
Petitioner,

By /s/ J. STUART NEARY,
Attorney for Petitioner.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
Of Counsel.

Certificate

I hereby certify that I have examined the foregoing Petition and that the facts therein cited are true and correct and that in my opinion the said

Petition is well founded and that the prayer of the petitioner should be granted by this Court.

/s/ J. STUART NEARY,
Attorney for Petitioner.

Affidavit of service attached.

[Endorsed]: Filed January 3, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER WILL RELY

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

H. W. Smith, the petitioner in the above-entitled proceedings, in compliance with Rule 19 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit certifies the following points to be relied upon in the review of the subject Order of the National Labor Relations Board:

A

1. That while holding that it had jurisdiction in fact within the meaning of the Act because of Petitioner's purchases and sales in interstate commerce, the National Labor Relations Board further held that Petitioner's business was essentially local, that the interruption of such business by labor disputes would have an insubstantial effect on com-

merce, that it had a discretionary power and authority to dismiss a complaint and proceedings properly initiated previous thereto by the General Counsel or his agent, that under this asserted discretion it could and did decline to exercise an existing jurisdiction which had been properly invoked by the General Counsel's filing and initiation of a complaint against the parties charged.

2. That the National Labor Relations Board does not have such discretion or authority with respect to the dismissal of complaints, which have been properly filed and initiated by the General Counsel, jurisdiction in fact existing.

3. That pursuant to Section 3 (d) of the Act the issuance of a complaint by the General Counsel or his agents is not subject to review by the Board.

4. That the Board, as an administrative agency, does not have the discretion and authority to decline to assert an existing jurisdiction, once such jurisdiction has been properly invoked and initiated.

B

If the order of the Board is held to have been issued without a decision or finding by the Board that jurisdiction in fact did or did not exist, the Board failing to make such finding of jurisdiction because under its asserted discretionary authority to dismiss the complaint and proceedings the existence of jurisdiction would not in either event be material, then Petitioner certifies the following

points to be relied upon in the review of the subject order of the National Labor Relations Board:

1. That the National Labor Relations Board does not have such discretion or authority with respect to the dismissal of complaints which have been properly filed and initiated by the General Counsel if the Board finds that jurisdiction in fact exists, and therefore the failure to find whether such jurisdiction did or did not exist is error.

2. That pursuant to Section 3 (d) of the Act the issuance of a complaint by the General Counsel or his agents is not subject to review by the Board if jurisdiction in fact exists and the Board in dismissing the complaint without making any finding as to whether jurisdiction in fact did exist committed error as it does not have discretion or authority to dismiss such a complaint if jurisdiction in fact exists.

3. That the Board, as an administrative agency, does not have the discretion and authority to decline to assert an existing jurisdiction, once such jurisdiction has been invoked and initiated, and the Board committed error therefore in failing to decide whether jurisdiction in fact existed.

4. That the Board in holding that it was not necessary for it to decide whether jurisdiction in fact exists since in either event it would dismiss the complaint and proceedings pursuant to its asserted discretion for policy reasons committed error in that the Board must disclose the specific grounds

upon which its order is based and may not base an order upon an alternative finding of the type described.

Dated: March 9, 1950.

Respectfully requested,
GIBSON, DUNN &
CRUTCHER,
Attorneys for Petitioner,
H. W. SMITH.

/s/ WILLIAM F. SPALDING,
Of Counsel.

[Title of Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

The Petitioner in the above-entitled proceedings hereby designates the following portions of the record to be printed:

1. The following portions only of General Counsel's Exhibit No. 1:

(a) Amended Charge Against Labor Organization or Its Agents, Case No. 21-CB-34, filed and subscribed on April 5, 1948, by John Binkley, attorney.

(b) The Complaint in Case No. 21-CB-34, subscribed April 7, 1948, by Daniel J. Harrington, Acting Regional Director, National Labor Relations Board, Twenty-first Region.

2. Trial Examiner Greenberg's Intermediate Report dated July 19, 1948.

3. Union's exceptions to the Intermediate Report dated September 9, 1948.

4. General Counsel's exceptions to the Intermediate Report dated September 24, 1948.

5. Decision and Order of the National Labor Relations Board issued May 13, 1949.

6. General Counsel's Motion for Reconsideration by the Board of its Decision and Order dated June 16, 1949.

7. Board's Order denying motion of General Counsel for reconsideration of Decision and Order dated June 30, 1949.

Dated: March 9, 1950.

Respectfully requested,
GIBSON, DUNN &
CRUTCHER,
Attorneys for Petitioner,
H. W. SMITH.

/s/ WLLIAIM F. SPALDING,
Of Counsel.

Affidavit of service attached.

[Endorsed]: Filed March 10, 1950.

No. 12446

IN THE

United States Court of Appeal

FOR THE NINTH CIRCUIT

H. W. SMITH, d/b/a A-1 PHOTO SERVICE,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

GIBSON, DUNN & CRUTCHER,
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No. 12446

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. W. SMITH, d/b/a A-1 PHOTO SERVICE,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

Statement of Jurisdiction.

This is a proceeding to review an order of the National Labor Relations Board, being instituted by a person aggrieved by such order. The court acquires jurisdiction by virtue of Section 10 (f) (29 U. S. C. A. Sec. 160 (f)) of the National Labor Relations Act as amended which provides that any person aggrieved by a final order of the Board granting or denying the relief sought may obtain a review of the order in any Court of Appeals in the Circuit where the unfair labor practice was alleged to have occurred or wherein such person resides or transacts business.

The Petitioner resides and transacts business in the City of San Pedro, California [R. 52] within the jurisdiction of this court. The unfair labor practices hereafter described also occurred in the City of San Pedro, California.

As will also appear hereafter, the Petitioner is engaged in a business which is in commerce or which affects commerce within the meaning of the National Labor Relations Act (hereinafter referred to as the "Act"), Section 2 (6) and (7) (29 U. S. C. A. Sec. 152 (6) and (7)) (App. p. 4).

Statement of the Case.

The Petitioner, H. W. Smith, does business as A-1 Photo Service in San Pedro, California [R. 52]. On April 5, 1948, Petitioner filed with the Regional Office of the National Labor Relations Board (hereinafter referred to as the "Board"), Twenty-First Region, an amended charge alleging that the Retail Clerks International Association, A. F. of L., Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, had and were engaging in unfair labor practices affecting commerce. This amended charge appears at R. 78-79, being General Counsel's Exhibit No. 1. However, in printing the charge the printer for the most part printed only the standard form, omitting the inserted substance with respect to the charges.

The General Counsel of the Board, through the Regional Director, issued a complaint on April 7, 1948, against the Respondents [R. 80 *et seq.*] which complaint alleged the unfair labor practices contained in the charge referred to.

Pursuant to notice a hearing was held before a Trial Examiner [R. 4], who thereafter issued his Intermediate Report, findings, and recommendations [R. 2 *et seq.*]. This Intermediate Report found certain facts with respect to the business of the Petitioner and concluded from the facts that the Petitioner is engaged in commerce within

the meaning of the Act [R. 7-11]. With respect to the unfair labor practices the Trial Examiner found that the Respondents were guilty of certain of the unfair labor practices alleged but recommended dismissal of the complaint against the Respondents with respect to certain other alleged unfair labor practices since these other allegations were found to be, in the Trial Examiner's opinion, without merit in fact [R. 11-44]. The nature and circumstances of the unfair labor practices charged are not important to the consideration of this matter.

The Board thereafter considered the record and on May 13, 1949, issued its decision and order, the subject of this petition, dismissing the complaint against the Respondents in its entirety on the ground that, though the business of Petitioner constituted engagement in commerce within the meaning of the Act, such business was essentially local in nature, having too insubstantial an effect upon commerce to warrant the Board exercising its jurisdiction. The Board in no way considered the unfair labor practices or passed any judgment thereon. The rationale of the Board in dismissing the complaint though it had jurisdiction to act, and though it gave no consideration to the truth of the unfair labor practice charges, was that a business of the nature of Petitioner's was such that it "would not effectuate the purposes of the Act" for the Board to exercise its jurisdiction and the Board claimed to have discretionary authority to dismiss complaints in such cases [R. 51-60].

Thereafter, the General Counsel filed a motion for reconsideration of the Board's order [R. 60 *et seq.*] urging that the Board had no such discretion and that the institution of a complaint by the General Counsel could not

be dismissed by the Board upon the grounds asserted if there was jurisdiction in fact. The Board denied this motion [R. 77]. Thereafter, on January 3, 1950, Petitioner instituted this proceeding to review the order of the Board.

The facts with respect to Petitioner's engagement in commerce were not contested [R. 53]. These facts are set forth in the Board's opinion [R. 52-53] and the Intermediate Report [R. 7-11]. It there appears that Petitioner purchased approximately 44% of his total purchases directly in interstate commerce. The opinion of the Board itself discloses that the Board agreed that it had jurisdiction in fact and dismissed the complaint only because it did not see fit to exercise its admitted jurisdiction. The Board has filed in this court an Answer to the Petitioner's Statement of Points in which Answer the Board states that the only issue in the case is:

> "Whether the Board, having found that petitioner's operations affect commerce within the meaning of the Act, nevertheless had discriminatory [*sic*] authority to dismiss the unfair labor practice complaint upon finding further that, since such operations were essentially local and interruption thereof by a labor dispute would have only a remote and insubstantial effect upon commerce, the assertion of jurisdiction would not effectuate the purposes of the Act."

In this case, therefore, we have no question as to whether the Board had jurisdiction in fact since it admits it did. The only question relates to whether despite the existence of such jurisdiction it may decline to exercise it by dismissing the complaint issued by the General Counsel pursuant to the final authority vested in him by Section 3 (d) of the Act (App. p. 6).

Statement of Error Alleged.

The Amendments of 1947 to the National Labor Relations Act established the office of the General Counsel of the Board. Certain duties were assigned exclusively to the General Counsel so as to make him, at least in part, an agency independent, though within, the Board. One of these exclusive duties related to the issuance of complaints and the prosecution of cases before the Board, such duties to be performed independently of the Board and without review by the Board. This is set forth in Section 3 (d) as follows:

> "'(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.'"

In this particular case the General Counsel saw fit to issue a complaint. In making such a decision the General Counsel necessarily finds:

(1) That there is probable cause to believe the existence of unfair labor practices.

(2) There is probable cause to believe there is jurisdiction to correct these practices.

(3) The nature of these unfair labor practices and the effect upon commerce is sufficient to warrant the exercise of the Board's corrective jurisdiction.

Of course, when the matter comes to the Board it is free to find against the General Counsel on either (1) or (2), that is, that there were no unfair labor practices in fact or that there is no jurisdiction in fact. Section 10 (c) of the Act, Appendix p. 9, expressly so states. However, it is submitted that in view of Section 3 (d) the Board has no discretion or authority to re-examine the General Counsel's decision with respect to the third factor and to overrule the General Counsel on that factor and thereby dismiss the complaint.

We do not contend that the Board has no discretion. Once the Board has taken its jurisdiction and determined that unfair labor practices have been committed it has a broad discretion to take action designed to effectuate the policy of the Act. Such discretion, however, relates to the positive exercise of its corrective authority. It does not relate nor pertain to the question of whether the Board will or will not exercise such corrective authority.

In the instant case the Board has not exercised its discretion to effectuate the policies of the Act by eradicating the effect of unfair labor practices. It has decided, on the contrary, that it will not exercise its hearing function to determine if unfair labor practices were committed in a business admittedly subject to the Board's jurisdiction.

The error, therefore, alleged in this proceeding is that the Board erred in not determining whether unfair labor practices were committed and in assuming that it had authority to dismiss the complaint where jurisdiction in fact exists for policy reasons and despite the General Counsel's action in instituting the proceeding.

ARGUMENT.

It is contended herein that on the face of Section 3 (d) of the Act the decision of the General Counsel that there is sufficient policy cause to warrant the issuance of a complaint and his subsequent institution of such a complaint cannot be reviewed by the Board. The Board in deciding in this case that it did not see fit to exercise its jurisdiction because the business affected was of a local nature is a decision squarely in conflict with that of the General Counsel and constitutes, if valid, a reversal of his decision. While the Board insists that it is not reviewing the General Counsel's institution of the complaint, it is submitted that this constitutes a review and reversal in fact, whatever it may be called by name. This final and unreviewable authority of the General Counsel is supported by the Act read as a whole wherein it is evidenced that Congress intended to exercise its power over commerce to the fullest extent, whether it be great or small, national or local. It is also contended that the Board as a judicial agency does not have discretion to decide whether it will or will not act if its existing jurisdiction is properly invoked, although it does have a great deal of discretion in the manner in which it will act in the exercise of its jurisdiction. It is contended that such is the intent of the Act as appears on its face and as will be shown by the legislative history of the Act and the Congressional Record.

I.

The Board and This Court Has Jurisdiction Since the Business of the Petitioner Was an Engagement in Commerce and the Unfair Labor Practices Have an Affect Upon Commerce.

The Board agrees that it has jurisdiction because the business of Petitioner constitutes engagement in interstate commerce, or has an affect upon interstate commerce, or both. It is abundantly established by the authorities that the Board did in fact have jurisdiction in this case since Congress intended in the National Labor Relations Act to exercise its constitutional power to regulate businesses in interstate commerce and affecting interstate commerce to its fullest extent.

N. L. R. B. v. Fainblatt, 306 U. S. 601, 606, 83 L. Ed. 1014 (1939);

N. L. R. B. v. Cowell Portland C. Co., 108 F. 2d 198 (C. A. 9, 1939);

Polish National Alliance v. N. L. R. B., 322 U. S. 643, 88 L. Ed. 1509 (1944);

International Brotherhood of Electrical Workers, Local 501 v. N. L. R. B., 181 F. 2d 34, 36 (C. A. 2, 1950);

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 464, 82 L. Ed. 954, 959 (1938).

II.

Under the Act the Board Has No Authority to Review the General Counsel's Decision to Issue or Not to Issue a Complaint.

Section 3(d) (App. p. 6) provides that the General Counsel shall have *"final authority,* on behalf of the Board" to issue and prosecute complaints. Of course, if it appears that the General Counsel was wrong in his belief that the Board had jurisdiction, then the Board may, and in fact must, dismiss the matter. However, if the authority of the General Counsel is a "final authority" with respect to the issuance and prosecution of complaints, then, where jurisdiction exists, Section 3 (d) must mean that the decision of the General Counsel that the case is worthy of prosecution must be accepted as conclusive. If the Board has the authority to find that the complaint should not have been issued because the business is local, and thereupon has the authority to dismiss the complaint, then the General Counsel does not have "final authority" to issue complaints which function, of necessity, requires a decision by the General Counsel as to whether or not the nature of the business and the unfair labor practices are such as to justify exertion of jurisdiction. This "final authority" of the General Counsel on behalf of the Board precludes any review of the exercise of that authority by the Board itself; for otherwise the authority would not be final.

The Board does not disagree with the above statement. In fact, the Board admits that it cannot review the refusal

of the General Counsel to issue a complaint *and also admits that it cannot review the decision of the General Counsel to issue a complaint.* In its decision in this case the Board stated [R. 55]:

> "Furthermore, the legislative history shows that Congress intended the General Counsel to exercise his authority *to issue or refrain from issuing a complaint independently of any direction, control, or review by the Board.*" (Emphasis added.)

While the above admission would seem to end the matter, the Board attempts to escape such a result by claiming not to be reviewing the decision of the General Counsel but rather to be exercising its judicial power under the Act [R. 55], supporting this contention by the claim of a general discretionary authority to dismiss complaints [R. 58-59] and a general discretionary authority to act or not act as its discretion dictates.

There is no provision in the Act to warrant the Board's claim to such discretion. With the provisions of Section 3 (d) being written as they are, the authority of the General Counsel with respect to issuing and prosecuting complaints is *final.* Whatever the Board may call its action in disagreeing with the General Counsel's decision of policy such action cannot be consistent with a final decision or final authority of the General Counsel.

There have been instances in which an individual attempted to obtain review in the courts of the General Counsel's refusal to issue complaints. It has been consistently held in these cases that the decision of the Gen-

eral Counsel is not reviewable. It was so held in *Lincourt v. N. L. R. B.*, 170 F. 2d 306 (C. A. 1, 1948) where it is stated:

> "It is to be noted that the Labor Management Relations Act of 1947 introduced into § 3 of the National Labor Relations Act a new subsection (d), 29 U. S. C. A. § 153(d), which took away from the Board the administrative power to issue complaints under § 10. As the Act now reads, the General Counsel of the Board 'shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10.' Such administrative determinations by the General Counsel are not denominated 'orders' in the Act, and the Act makes no provision for their review. That the Board itself no longer has power to make such determinations only serves to emphasize, what is otherwise abundantly clear, that there has in this case been no 'final order of the Board' within the meaning of § 10(f)." *Lincourt v. N. L. R. B.*, 170 F. 2d 306, 307 (C. A. 1, 1948.)

To similar effect see:

> *General Drivers, etc. Union v. N. L. R. B.*, 179 F. 2d 492 (C. A. 10, 1950).

In *Herzog v. Parsons*, 25 L. R. R. M. 2413, 17 L. Cases, par. 65,610 (C. A. D. C. Feb. 20, 1950) the Court of Appeals for the District of Columbia had an issue which came close to that involved in the instant case. (This decision, while given February 20, 1950, cannot be found reported in the Advance Sheets of the Unofficial Reports.) That case involved the question of whether under Section 10 (k) of the Act, which deals with unfair labor practices under Section 8 (b) (4) (D), the Board

must forthwith hold a hearing or whether it may first investigate to see if there is a *prima facie* case. The court held it was without jurisdiction and stated in closing, citing Section 3 (d) for the statement:

> "It is not necessary for us to decide at this time to what extent this decision precludes judicial review of these administrative determinations by the General Counsel of the Board, though we do agree with the action of the Board in the instant case in refusing to review the determination of that officer *because by virtue of the provisions of the Act final authority, at least as far as the Board is concerned, is vested in him.*" (Emphasis added.) *Herzog v. Parsons,* 25 L. R. R. M., 2413, 2418-2419, 17 L. Cases par. 65,610 (C. A. D. C. Feb. 20, 1950).

The word "final" is one with varying implications. In some instances it is only a "final" matter which is reviewable at all; in other instances the term "final" indicates that no review is available. In this case the term "final authority, on behalf of the Board" means that so far as concerns the Board the authority is final and therefore without review within the Board. Whether the authority and decision is reviewable in the courts and outside of the Board is a question not involved although the *Lincourt* case, *supra,* and the *General Drivers, etc. Union* case, *supra,* hold that the "final authority" of the General Counsel is nowhere reviewable.

In *Bryan v. Union Oil Co. of California,* 155 F. 2d 625 (C. A. 9, 1946), this court had a similar problem with respect to the term "final" as it occurred in an Act (46 U. S. C. A. Sec. 3) which makes final the decision of the Commissioner of Navigation on the question of the

propriety of a tonnage tax. This court held that in view of the term "final" no further review of the decision of the Commissioner of Navigation was available within the administrative body. This court stated:

> "Three months later, in the Laidlaw case, the Circuit Court for the District of Oregon decided that the Act of July 5, 1884, 46 U. S. C. A. § 3, which makes final the decision of the Commissioner of Navigation on the question of refunding a tonnage tax erroneously imposed, does not take away the right of action from the person who paid the tax, but the purpose and effect of the act is that *such decision shall be 'final' in the department,* so that the Secretary of the Treasury shall not be burdened with the duty of reviewing it. The Court deliberated and carefully considered the 'first blush' impression that the aforesaid Act repealed the taxpayer's right of redress in the courts, but concluded 'on reflection, I am satisfied that the word "final" is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.' In fact, the Court there intimated that if the Act were intended by Congress to deprive a taxpayer of all redress in the courts it would be contrary to the Fifth Amendment and unconstitutional." (Emphasis added.) *Bryan v. Union Oil Co. of California,* 155 F. 2d 625, 626-627 (C. A. 9, 1946).

The case of *Laidlaw v. Abraham,* 43 Fed. 297 (Cir. Ct., Dist. of Oregon 1890), which was approved by this court in the above case was a suit to recover a tonnage tax in which the defendant collector contended that in view of the term "final" occurring in the Act the court had no jurisdiction to review the decision of the commissioner. The court stated:

"This act is entitled 'An act to constitute a bureau of navigation in the treasury department.' The commissioner created by it is charged, 'under the direction of the secretary of the treasury' with many duties concerning 'the commercial, marine, and merchant seamen of the United States;' and, by section 3 thereof, 'with the supervision of the laws relating to the admeasurement of vessels and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, *his decision shall be final.*'

* * * * * * * *

"But, on reflection, I am satisfied that the word 'final' is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.

"In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to side track into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the exaction of the same by collectors.

"The appeal is still taken to the secretary of the treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is 'final' in the department, *as it would not be but for this provision of the statute.*" (Emphasis added.) *Laidlaw v. Abraham,* 43 Fed. 297, 299 (C. C. D. Ore. 1890).

A similar problem of division of authority within an administrative agency was involved in *United States v.*

Tod, 1 F. 2d 246 (C. A. 2, 1924). The Immigration Act provides appeals to the Secretary of Labor from the board of special inquiry in certain cases, but in other cases states that the decision of the Board is final. The court held the latter precludes any review in those cases holding with respect to the term "final":

> "In the instant case the board of special inquiry, which is the board that first acted, excluded the relator as we have seen; the exclusion being based upon the medical certificate. The word 'final,' as defined in Bouvier's Law Dictionary, is: 'Last; conclusive; pertaining to the end.' And in Burrill's Law Dictionary it is said to be 'that which terminates a matter or proceeding.' In 13 Am. & Eng. Encyc. of Law, p. 19, it is said: 'Final means conclusive; from which there is no appeal.' When a legislative act creates a tribunal and provides that its decision shall be 'final' on a given matter, the courts have held that the legislative intent was that its decision was not subject to review or appeal, but was conclusive of the question decided. [Citing many cases.]" (P. 252.)
>
> * * * * * * * *
>
> "As the Immigration Act declares that the decision of the board of special inquiry shall be 'final,' we are at a loss to see that either the Secretary of Labor, the Commissioner General of Immigration, the Commissioner of Immigration, or the immigration inspector in charge, who are all alike bound mandatorily by the 'final' decision of the board of special inquiry, have any power to reopen the 'final' decision." (P. 259.) *United States v. Tod,* 1 F. 2d 246, 252, 259 (C. A. 2, 1924).

This case was reversed in 267 U. S. 571, 69 L. Ed. 793 without opinion upon the confession of error by the Solicitor General. In *United States v. Watkins,* 170 F. 2d 1009

(C. A. 2, 1948) the same court followed the *Tod* decision treating it as conclusive and stating that the reversal without opinion did not render it ineffective.

See also *20 Opinions of Attorneys General of the United States,* p. 367, advising the President of the United States pursuant to the *Laidlaw* case, *supra,* that he had no authority to review the decision of the Commissioner of Navigation, stating:

> "It can not well be denied that this determination is fairly within the enactment quoted, which makes the decision of the Commissioner final on all questions of interpretation growing out of the execution of the laws relating to the collection of the tonnage tax, and to the refund thereof. Of course it is not intended to advise that the Commissioner of Navigation, if convinced that he has made an erroneous ruling, may not make a different ruling. But it is my opinion that the construction of the law declared in due course by that executive officer designated by Congress to interpret the same ought to be regarded, and that, as this case now stands, the Executive is not clothed with authority by reversing that decision to adjust this claim for past exactions." 20 Opinions of Attorneys General of the United States, pp. 367, 370-371.

These cases give affirmance to the meaning which the term "final authority" bears on its face. In view of the Board's admission that it cannot review the General Counsel's issuance of a complaint, the only question is whether the action of the Board in the instant case constitutes a review. Whatever name may be given the action it is apparent that it is in fact a review as indicated by the above cases dealing with Section 3 (d) of this Act and analogous provisions in other Acts.

III.

The Legislative History of the Act Clearly Demonstrates That Congress Intended a Complete Separation of Function and Authority Between the General Counsel and the Board and That the Institution of Complaints by the General Counsel Was a Final Invocation of Jurisdiction so far as Concerns the Board if Jurisdiction in Fact Exists.

The legislative history, Committee Reports, and Congressional Debates with reference to the Act fully demonstrates that the plain implications of the term "final authority" were fully intended by Congress.

Under the Wagner Act the Board was both prosecutor and judge, and this situation led to the most violent dissatisfaction with such an administrative system. The Congressional Record is replete with evidence that Congress intended, with the Amendments of 1947, to sever these functions, to relegate the Board to the position of judging facts in a judicial manner, having nothing to do with the investigation and action which precede the hearing, including the decision incident to issuance of a complaint. This purpose was carried out by Congress in establishing the office of the General Counsel within, but nevertheless at least in part independent, of the Board. In order to completely remove the Board from the field of prosecution, it was necessary to give the General Counsel complete freedom and independence from the Board and to that end Congress vested in him "final authority" to perform those duties which the Act placed upon him. The House version of the Amendments enacted in 1947 was contained in H. R. 3020. Section 4 of this Bill (App. pp. 11-12) set up a completely independent agency called the Admin-

istrator of the National Labor Relations Act, and assigned him the function of investigating charges, issuing complaints, enforcing Board orders and conducting elections. While the Administrator was established as an agency completely apart from the Board, it will be noted that the House Bill made no express statement with respect to the finality of the Administrator's action.

The Senate version of the Amendments originated with S. 1126, which Bill had no provision with respect to an Administrator or General Counsel. The Senate passed its own version of H. R. 3020, which is reproduced herein in Appendix, page 13. Section 3 of this Bill established the Board much as it was under the old Act and did not have any of the provisions in it with respect to the Administrator as previously contained in the House version of H. R. 3020, Section 4.

Thereafter, a Conference Bill was reported out which was passed by both Houses without further amendment and which contained a provision establishing the office of the General Counsel. This final Bill is set forth in the Appendix; see Section 3, Appendix, pages 5-6. Thereafter, the President vetoed this Bill but Congress passed it into law over his veto.

The Committee Reports of these various Bills and the debates are illuminating on the issue in this proceeding. The House Committee on Labor and Education which reported out H. R. 3020 with the provision contained in it with respect to the Administrator clearly indicated that

the Bill sought to separate the prosecuting and judicial functions and to make the Administrator completely independent of any type of review by the Board. The Committee stated:

"Unlike the old Board, it will not act as prosecutor, judge, and jury. *Its sole function will be to decide cases.* A new and independent officer, the Administrator of the new Act, will investigate cases and present evidence to the new Board and the new Board must decide the cases . . ." (Emphasis supplied.) H. Rep. No. 245, 80th Cong., 1st Sess., p. 6.

* * * * * * * *

"Briefly, the Administrator takes over the investigating and prosecuting functions of the present Board, . . . The Administrator is to be an independent agency of the Government and is to act free of influence and control by the Board and its staff.

* * * * * * * *

"In unfair labor practice cases, the Administrator will determine whether or not an alleged unfair labor practice is, indeed, such a practice under the act, and if so, he will proceed as members of the Board's field staff have proceeded in the past." H. Rep. No. 245, 80th Cong., 1st Sess., p. 26.

* * * * * * * *

"If the Administrator has reasonable cause to believe that the charge is true he issues a complaint and has it served on the person complained of. *It is only when the facts the complainant alleges do not constitute an unfair practice, or when the complainant clearly cannot prove his claim, that the Administrator has any discretion not to issue a complaint.*" H. Rep. No. 245, 80th Cong., 1st Sess., p. 40.

Even the Minority members of the House Committee realized that the function of the Board under H. R. 3020 would be simply to decide cases.

> "The functions of the Board are to be limited solely to the decision of cases and the Administrator is to assume all of the investigatory and prosecuting functions of the present National Labor Relations Board."
>
> H. Rep. No. 245, 80th Cong., 1st Sess., p. 74.

While S. 1126 did not provide for a separation of functions, the Senate nevertheless intended the Board to achieve at least a measure of separation of functions. This Bill in Section 4 expressly provided that the section maintained by the Board to assist it in reviewing the record of cases submitted to it was to be abolished. The Senate Report stated:

> "Since it is the belief of the committee that *Congress intended the Board to function like a court,* this bill eliminates the Review Section." (Emphasis supplied.) Senate Rep. No. 105, 80th Cong., 1st Sess., p. 9.

The Bill reported out of the Conference Committee is the present statutory enactment. The House Conference Report stated with respect to the Conference Bill and its provision for the General Counsel's office:

> "The conference agreement does not make provisions for an independent agency to exercise the investigating and prosecuting functions under the act, but does provide that there shall be a General Counsel of the Board, who is to be appointed by the President, by and with the advice and consent of the Senate, for a term of 4 years. The General Counsel is to have general supervision and direction of all

attorneys employed by the Board (excluding the trial examiners and the legal assistants to the individual members of the Board), and of all the officers and employees in the Board's regional offices, *and is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints* of unfair labor practices, and in respect of other duties as the Board may prescribe or as may be provided by law. By this provision responsibility for what takes place in the Board's regional offices is centralized in one individual, who is ultimately responsible to the President and Congress." (Emphasis added.) H. Rep. No. 510, 80th Cong., 1st Sess., p. 37.

Senator Taft filed a summary of the provisions of the Conference Bill in the Senate, discussing the reorganization of the National Labor Relations Board as accomplished by that Bill. This summary stated in part:

"One of the major problems with which the conferees were faced was the reconciliation of the provisions of the House bill and the Senate amendments with respect to the reorganization of the National Labor Relations Board. Under the Senate amendment the present Board members were to be retained in office but four additional members were to be added, thus increasing the Board to seven. The House bill abolished the present Board, created a new Board of three members and limited the duties of the members to quasi-judicial functions. The House bill also created a new independent agency under an administrator to be appointed by the President (subject to Senate confirmation) to perform the investigating and prosecuting functions.

"The conference agreement (section 3(a)) retains the existing Board and increases its membership to five rather than seven. *Further, it recognizes the principle of separating judicial and prosecuting functions without going to the extent of establishing a completely independent agency. It accomplishes separation of functions within the framework of the existing agency by establishing a new statutory office, that is, a general counsel of the Board to be appointed by the President, by and with the advice and consent of the Senate, for a term of 4 years. . . . He is also to have the final authority to act in the name of, but independently of any direction, control, or review by the Board* in respect to the investigation of charges and the issuance of complaints of unfair labor practices and in the prosecution of such complaints before the Board." (Emphasis added.) 93 Cong. Rec. 6599, June 5, 1947.

And again:

"The combination of the provisions dealing with the authority of the general counsel, the abolition of the review division, and the limitation of duties of the trial examiners effectively limits the Board members to the performance of quasi-judicial functions." 93 Cong. Rec. 6600, June 5, 1947.

Senator Taft also made a supplemental analysis of the Conference Bill in which he stated with respect to the General Counsel:

"Section 3(d): In order to make an effective separation between the judicial and prosecuting functions of the Board and yet avoid the cumbersome device of establishing a new independent agency in the executive branch of the Government, the conferees cre-

ated the office of general counsel of the Board, . . . We invested in this office final authority to issue complaints, prosecute them before the Board, and supervise the field investigating and trial personnel." 93 Cong. Rec. 7001, June 12, 1947.

The following statement by Senator Morse made in debate discloses the understanding of the opponents to the Conference Bill:

> "I believe that the provisions of the amended bill, insofar as they create a statutory office of General Counsel, who is to be appointed by the President for a fixed term of years, and confer upon him final authority in respect to investigation and prosecution of charges and issuance of complaints, in effect establish a separation of functions which does not differ in any substantial measure from the kind of separation which we opposed when it appeared in Senate bill 360, the Ball Bill . . ." 93 Cong. Rec. 6612, June 5, 1947.

In the debate in the House of Representatives on the Conference Bill the following took place between Representative Owens, a member of the House Labor Committee, and Chairman Hartley of the House Labor Committee:

> "Mr. Owens. I believe that one of the most important portions of this bill is the division of powers; that is, the division of the functions, the investigation, the prosecution, the complaints, and the judicial end. The gentleman mentioned that the general counsel would be absolutely independent.
>
> * * * * * * * *

"MR. OWENS. It is my understanding that the conference is saying to the House at this time that those different sections, where they mention the Board, means that it is the general counsel who shall have the power to proceed with the investigation, with the complaint, and shall have complete power over the attorneys who are prosecuting; that the Board shall not control him or *have the right of review in any way.* Is that correct?

"MR. HARTLEY. The gentleman's opinion is absolutely correct. . . ." (Emphasis supplied.) 93 Cong. Rec. 6540, June 4, 1947.

The Congressional debates fully disclose that Congress realized the extent to which they vested final authority in a single person, without the right of any tribunal to review or overrule his decision. The opponents of the Bill at great length stated their reluctance to see this "czar" and "dictator" being injected into this field of regulation. The following statements along these lines were made by Senator Murray:

"The effect of this provision, is to set up a labor czar within the National Labor Relations Board. . . . One person will determine when complaints shall issue in all cases . . ., how cases shall be tried, which cases shall be enforced. . . . No real power is vested in the Board in order that their collective common sense may be brought to bear on these serious problems. The whole purpose of the administrative process, that uniform policies may prevail at all levels of work, is thereby frustrated. . . . Coordination in policy is essential in order that rules and regulations, prosecutions, and decisions maintain some consistency." 93 Cong. Rec. 6655, June 6, 1947.

* * * * * * * *

"The effect of the proposed change in the status of the Board's General Counsel is to place enormous power in the hands of a single individual, making him virtually a 'labor czar'. This power would include the right to decide what unfair labor practice cases shall come before the Board and the courts for decision. Through this power, the General Counsel, to a considerable degree, would be able to control the policy for the enforcement of the Act." 93 Cong. Rec. 6661, June 6, 1947.

Senator Pepper informed the members of the Senate of the authority of the General Counsel as follows:

"The General Counsel is to determine when a complaint shall be acted upon by the Board. In other words, one man is made the arbiter of every case that comes before the attention of the Board. *The Board has no authority to decide whether a case should be brought, or whether a complaint should be acted upon.* That exclusive power is given to one lawyer, provided for by the bill agreed to in the conference of the House and the Senate." (Emphasis added.) 93 Cong. Rec. 6672, June 6, 1947.

The President stated in his veto message with reference to the office of the General Counsel:

"It would invite conflict between the National Labor Relations Board and its General Counsel, since the General Counsel would decide, without any right of appeal by employers and employees, whether charges were to be heard by the Board, and whether orders of the Board were to be referred to the Court for enforcement. By virtue of this unlimited authority, a single administrative official might usurp

the Board's responsibility for establishing policy under the Act." H. Doc. No. 334, 80th Cong., 1st Sess.; 93 Cong. Rec. 7502, June 20, 1947.

This understanding of the President is consistent with that of the Congress itself as indicated by the above statements.

The enacted Amendments of 1947 were not the first attempt by Congress to establish an office similar to that of the General Counsel. In the 76th Congress, 3rd Session, there was introduced the so-called Smith Bill, H. R. 9195, which passed the House of Representatives but was not reported out of the Senate Committee on Labor. The provisions of the Smith Bill relating to the separating of functions were, with minor exceptions, exactly the same as H. R. 3020 which passed the House of the 80th Congress. Section 4 of H. R. 3020 was contained in Section 3(c) of the Smith Bill, H. R. 9195, 76th Congress. The Intermediate Report of the Committee which handled the Smith Bill stated:

"Consequently, the committee recommends most emphatically the adoption of its amendment to section 3(a) of the act, which creates an entirely separate board *entrusted solely with the judicial function of this agency.* There is proposed in section 3(d) an Administrator (following the pattern of some of the more recently created administrative bodies) whose function will be to carry on the investigative and prosecuting functions entirely separate and distinct from the judicial function of the Board proper.

"The Administrator, of course, will have to be a competent and trustworthy public official, appointed by the President and confirmed by the Senate, *for in his discretion lies the determination of which cases*

are worthy of prosecution. Objection has been made to this provision on the ground that it will lie within his discretion as to whether complaints shall be preferred for violation of the act. This is true. It is equally true that that discretion now rests with the Board. The committee has no reason to anticipate that the Administrator, whoever is appointed, will not honestly perform his functions . . ." (Emphasis added.) H. Rep. 1902, 76th Cong., 1st Sess., p. 89.

The Minority Report of this Committee stated:

"Under the amendments proposed by the majority, the functions of the Board would be limited to holding hearings, making findings, and issuing orders (sec. 3(a); sec. 10)." H. Rep. 1902, Part 2, 76th Cong., 1st Sess., p. 15.

* * * * * * * *

"The amendments recommended by the majority seek to establish what amounts to a labor court." H. Rep. 1902, Part 2, 76th Cong., 1st Sess., p. 19.

It is true that the office of the General Counsel established in the Conference Bill did not have the independence of the Administrator as set forth in H. R. 3020. However, in the sense in which we are interested in the independence of the General Counsel the Conference Committee gave the General Counsel a degree of finality in his authority which the House had not given the completely independent Administrator. This is evidenced by the fact that H. R. 3020 contained no statement with respect to the finality of the Administrator's action while the Conference Bill gave the General Counsel "final authority" within his field even though in other respects the General Counsel was an integral part of the Board. The Confer-

ence Bill likewise gave the General Counsel greater authority than the Administrator in that the Conference Bill did not require the General Counsel to issue complaints in all cases (as did the House Bill) but simply left this matter to his discretion. As indicated by the various reports and debates, Congress gave this final authority to the General Counsel with full realization of what it was doing and with the open intent of achieving the full implications of Section 3(d).

Included in the authority of the General Counsel, as Congress realized, was the uncontrolled discretion to determine the type and choice of cases which would go before the Board for decision; and this exercise of discretion was, as Section 3(d) states, to be final on behalf of the Board; and as Section 3(d) itself implies, and as the legislative history proves, this was all to be without any type of review by the Board itself. If it is true that Congress gave the General Counsel that discretionary authority, without review by the Board, can it be said that the General Counsel possesses such final authority if the Board can dismiss cases on the ground that they do not think the case is of the type they care to hear or in which they choose to exercise their jurisdiction? If the Board may do that, then the General Counsel does not have final authority to determine the type of cases to be brought before the Board. If the Board may do that the General Counsel does not have final authority to issue complaints because the Board is saying no more than that the complaint before it should not have been instituted, and since it should not have been instituted, they will dismiss it

summarily without any consideration of the merits of the case, and though they possess jurisdiction to act. It is submitted that if the Board may do this, not only does the General Counsel not have final authority but the Board is not performing its sole function of deciding cases. Rather, it is refusing to decide cases and choosing the type of cases which it cares to decide. Clearly Congress intended to take from the Board this discretion which admittedly it had had prior to the Amendments of 1947.

This construction of the Act achieves an efficiency of administration and a centralization of authority which is desirable and reasonable. Where possible, it is, of course, assumed that Congress intended to enact provisions which would achieve such results. It is apparent that if Congress was to separate the prosecuting and the judicial function of the Board, it would have to do so in a manner which gave the prosecuting authority complete finality in his decisions. If functions are to be separated, the Board must not tell the General Counsel of the cases it desires to hear. If the Board is not to do that, the decision of the General Counsel must be made unhampered of any authority of the Board. If so, then, when the General Counsel has instituted a complaint, that is an end to the matter. The only function remaining is the decision of the case including, of course, the decision of whether there is jurisdiction in fact and whether or not unfair labor practices were committed; but to add to that function the authority to decide apart from the merits of the case that the matter should not, on policy grounds, have

been instituted in the first place is simply to reduce the General Counsel to the position of an automaton, not having any authority, and guided only by a method of trial and error in his presentation of cases. It would mean that after the effort in presenting the case has been expended, after all the evidence has been taken, after the transcript has been prepared and submitted to the Board, after the parties have journeyed to Washington to argue the case before the Board, then, after all of that they are told by the Board that it should never have been started at all, that the Board has decided not to do that which the General Counsel has already done. Congress could not have intended to create such a frustrated authority in the General Counsel. An agency so established could lead to nothing but confusion and useless expenditure of Government and private funds. Such a situation actually exists today in view of the Board's claim of authority to dismiss complaints where it does not see fit to exercise its jurisdiction (see App. p. 30). Congress could not have intended the unreasonable situation existing in the present application of the Board's position. (See: 28 N. C. Law Rev. 1.) There is only one way in which such a situation could have been avoided by Congress and that is to establish in the General Counsel an authority to choose the cases which the Board would decide with the intent that such choice when made by the General Counsel would be final so far as concerns the Board. It is submitted that the Act itself, and especially in the light of its history, fully discloses that Congress intended to do just that.

IV.

The Board, Under the Act and in the Light of Principles Applicable to Quasi-Judicial Agencies, Does Not Possess Its Claimed Discretion to Exercise or Not Exercise Its Jurisdiction as It Sees Fit.

A. Section 10 of the Act Does Not Grant Discretion to the Board to Decide if It Will Exercise Its Jurisdiction. On the Contrary, Section 10 Places a Mandatory Obligation on the Board to Exercise Its Jurisdiction Once It Is Invoked by the Issuance of a Complaint.

In its opinion the Board states [R. 53-54]:

> "Under Section 10 of the Act, as amended the Board is 'empowered' to prevent any person from engaging in any unfair labor practice 'affecting commerce,' but it is not directed to exercise its preventive powers in all such cases. From this, we believe it reasonable to infer, in the absence of any convincing evidence to the contrary, that Congress intended the Board to continue to have discretionary authority to decline to exercise these powers in appropriate cases, as it had under the Wagner Act. The Board can now exercise this discretionary authority only by dismissing a complaint. We have therefore dismissed complaints—as we have declined to proceed with representation cases—when, in our opinion, the assertion of jurisdiction would not effectuate the policies of the Act."

This the Board states despite its admission [R. 55] that it does not have authority to review the decision of the General Counsel to issue or not to issue a complaint. Section 10 of the Act, which apparently is the basis of the

Board's claim to this discretion, is reproduced at Appendix pages 7-10. It is submitted that the Board does not have the discretion which it asserts. To the extent that Section 10 grants a discretion to exercise jurisdiction, the Board's argument ignores the fact that Section 3(d) grants that discretion to the General Counsel. Also of relevance is the fact, as will be hereinafter established, that in enacting this Act Congress intended to exercise its power to regulate commerce to the fullest extent of its constitutional ability, including even those incidents which, when considered in isolation, are merely local. Such an intent means that once existing jurisdiction is invoked the quasi-judicial power of the Board must be exercised. After the invocation of jurisdiction, by the institution of a complaint, discretion to act is at an end and the function of the Board to decide cases has become mandatory. We do not mean that Section 10 does not grant discretion to the Board. Section 10 does, in fact, grant a very large discretion to the Board; but the discretion granted in Section 10, except to the extent to which it is granted to the General Counsel, is not a discretion to act or not act but simply is a discretion as to the manner in which it will act to eradicate the effects of unfair labor practices.

Section 10(a) provides that the Board is empowered "as hereinafter provided" to prevent unfair labor practices. The phrase "as hereinafter provided" cannot be ignored. Section 10(b) provides that the Board "shall have power" to issue a complaint. This reference to the Board obviously means the General Counsel, an integral part of the Board, as shown by Section 3(d). The Board has argued in its decision that the terms "empowered" and "shall have power" to prevent unfair labor practices and to issue complaints convey a permissive rather than

mandatory authority. As will appear hereinafter those terms may well be mandatory despite their permissive nature. However, assuming for the moment that the terms are permissive, it is impossible to understand how the discretion conveyed by such permissive language can be considered to be vested in the Board rather than in the General Counsel.

Section 10(c) is the grant to the Board of its corrective power. That section states, and it speaks here with reference solely to the Board proper, that if the Board be of the opinion that unfair labor practices have been committed, "then the Board *shall* state its findings of fact and *shall* issue . . ." an order requiring the person guilty to cease and desist, and to take such "*affirmative* action" as will effectuate the policies of this Act. Section 10(c) also goes on to provide that if the Board shall not be of the opinion that unfair labor practices have been committed, then the Board "*shall*" state its findings and "*shall*" dismiss the complaint. Except for the discretion granted to issue an order requiring "affirmative" action by the party guilty of unfair labor practices, this section surely conveys no discretion whatsoever to the Board. It states that if it believes that unfair labor practices are committed, it "shall" issue a cease and desist order; if it is of the opinion that unfair labor practices were not committed, it "shall" dismiss the complaint. The section does not state that it may dismiss the complaint if it sees fit. It only states that after considering the evidence it "shall" issue an order or dismiss depending upon its findings with respect to the unfair labor practices charged.

In summary, therefore, Section 10 provides:

(1) Section 10(a) provides the Board is empowered "as hereinafter provided" to prevent unfair labor practices.

(2) Under Section 10(b) "as hereinafter provided" is found to mean that the General Counsel (in the light of Section 3(d)) has discretion and final authority to issue a complaint charging the unfair labor practices.

(3) Under Section 10(c) "as hereinafter provided" is found to mean that the Board *must* consider the evidence with respect to unfair labor practices and it shall make its decision with respect to such unfair labor practices, issuing a cease and desist order or dismissing the complaint depending upon its findings with respect to the unfair labor practices.

Even in the matter of determination of representatives and elections, which admittedly is under the exclusive authority of the Board, the Board does not have its claimed discretion to decline its jurisdiction. Section 9 of the Act states the Board's function in cases involving representation. Section 9(c)(1) states that whenever a petition is filed seeking a determination of representatives "the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide for an appropriate hearing upon due notice. If the Board finds upon the record of such hearing that such a question of representation exists, it *shall* direct an election by secret ballots and *shall* certify the results thereof." Surely this provision conveys no discretion to act upon the Board. It is mandatory that the Board determine a matter of

representation if it has reasonable cause to believe that such a question exists, affecting commerce. The term "affecting commerce" is identical with the term "jurisdiction" (see Section 2(7) of the Act, App. p. 4). If the Board has jurisdiction, then the question affects commerce and if it affects commerce, then the Board has jurisdiction In short, if it has jurisdiction it must decide the question of representation presented to it. This is the plain meaning of Section 9 of the Act. This becomes obvious in the light of the language of the original Wagner Act wherein Section 9(c) provided that whenever a question of representation arises "the Board *may* investigate such controversy and certify to the parties, * * *" the representative selected. It is submitted that Section 10, dealing with the prevention of unfair labor practices, is on its face equally mandatory so far as concerns the Board proper. The Board surely cannot claim as great a discretion in exercising its jurisdiction in unfair labor practice matters as it could have claimed in representation matters.

B. Congress Intended to Exercise Its Regulatory Power Over Unfair Labor Practices to the Fullest Extent of Its Ability. The Board May Not, Therefore, Decline to Exercise Such Power When Jurisdiction Is Invoked.

The Board intimates in its opinion that its claimed discretion is one which is inherent in an administrative agency exercising judicial functions. The source of this claimed discretion, if it is not Section 10, is not disclosed. The Board simply states that as an administrative agency it has, by definition, such discretion. This involves the question of whether the functions of the Board are per-

missive or mandatory, which question, of course, depends upon the intent of Congress. This question cannot be divorced from the questions of the functions of the General Counsel. Apparently Congress did intend to convey a discretion to act and to the extent it did so it placed that discretion in the General Counsel. Once he has seen fit to invoke the Board's jurisdiction, the Board has no discretion itself to decline to exercise it. This is evidenced not only by the "final authority" of the General Counsel but also by the patent fact that Congress intended the Board to exercise its power over unfair labor practices to the fullest extent possible under the Commerce Clause, and even over merely local businesses. This was authoritatively decided in *N. L. R. B. v. Fainblatt,* 306 U. S. 601, 606, 83 L. Ed. 1014 (1939). It was recognized and applied by this court in *N. L. R. B. v. Cowell Portland C. Co.,* 108 F. 2d 198 (C. A. 9, 1939), where this Court stated:

> "The National Labor Relations Act 'on its face * * * evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts. * * * Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis.' National Labor Relations Board v. Fainblatt, supra, 306 U. S. 607, 59 S. Ct. 672, 83 L. Ed. 1014.
>
> "The quantity of cement shipped out of state is not de minimis merely because it is but a small per-

centage of respondent's total sales. Otherwise, we would have the anomaly of one plant under federal regulation because exporting its entire products of 14,000 barrels while alongside it another competing plant under state regulation because, though shipping the same amount of 14,000 barrels, they constituted, say, but 4 per cent of its product. Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, such a destructive anomaly. Nor is the quantity of a particular product shipped out of state de minimis merely because it is small in proportion to the total interstate commerce in that product from all the states or from the employer's state."

N. L. R. B. v. Cowell Portland C. Co., 108 F. 2d 198, 201 (C. A. 9, 1939).

In *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 85 L. Ed. 881 (1941), the court cites the National Labor Relations Act as a typical regulatory Act in which Congress explicitly conveyed its purpose to regulate activities which in isolation are merely local.

Also, in *N. L. R. B. v. White Swan Co.,* 313 U. S. 23, 85 L. Ed. 1165 (1941), the court held that the term "local business" is meaningful for purposes of jurisdiction under the Act only in the light of the findings of the Board disclosing the type of jurisdiction which it claims; that is, whether the Board found commerce itself or jurisdiction based on an affect upon commerce.

In *Polish Nat. Alliance v. N. L. R. B.*, 322 U. S. 643, 647-8, 88 L. Ed. 1509, 1514-15 (1944), the Supreme Court states that in the National Labor Relations Act Congress has undertaken to regulate all conduct which under the Commerce Clause is capable of Federal regula-

tion; that Congress has evidenced its intent to even regulate local businesses; that the jurisdiction of the Board and the applicability of the Act is not judged by the affect upon commerce of the practices engaged in in each particular case, but rather is judged by the totality of all such conduct in all cases; in other words, by such practices in general rather than those in a specific case. The Supreme Court also stated that the Board is to determine in each case if there is an affect upon commerce, doing so when judged in the light of the full reach of the power of Congress. While the latter statement is still true under the Amendments of 1947, the determination with respect to the affect upon commerce of each case is by Section 3(d) vested in the General Counsel rather than in the Board as under the Wagner Act.

Also see:

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 464, 82 L. Ed. 954, 959 (1938);

International Brotherhood of Electrical Workers, Local 501 v. N. L. R. B., 181 F. 2d 34, 36 (C. A. 2, 1950).

In the Amendments of 1947 Congress further evidenced its intent to extend its power to its fullest limits. The Preamble of the Labor Management Relations Act of 1947 (App. pp. 1-2) states the policy "to promote the *full* flow of commerce." The Preamble to the original Wagner Act (App. pp. 2-4) states the policy to eliminate the causes of certain "substantial obstructions to the free flow of commerce. * * *" This reference to "substantial obstructions" in this Preamble refers to labor disputes in general as being a substantial obstruction rather than re-

ferring only to those individual labor disputes which are substantial obstructions. See *Polish Natl. Alliance v. N. L. R. B., supra.*

The definitions of commerce and affecting commerce, Section 2 (6), 2 (7) (App. p. 4), measures the reach of the Board's jurisdiction. In Section 10 (a) Congress provided in the Amendments of 1947 for the cession of jurisdiction by the Board to State agencies even including mining, manufacturing and communications where predominantly "local" in character. By this treatment Congress had in mind the coverage of all businesses under the Act even those local in character. It apparently did not intend for any business capable of regulation to go unnoticed. It is easy to infer from this provision, in the light of Congress' intent to exercise its power in full, that the Board is to exercise its jurisdiction over local business except in the cases where it is able to cede such jurisdiction to State agencies. The mandatory provisions of Section 9 (c) relating to determination of representatives, and Section 10 (c) relating to the prevention of unfair labor practices, equally evidences Congress' intent that the Board exercise the power to the full extent that Congress has provided.

This intent of Congress is not consistent with the Board's claim of a discretion not to decide cases relating to businesses of a local nature. The only discretion in the matter in any way granted by the Act is lodged in the General Counsel. Once it has been invoked by him there is no provision anywhere in the Act for further discretion in such matter by the Board. In fact, any further existence of discretion would not be compatible with the evident intent of Congress.

The authorities are in agreement that when a legislative body has evidenced an intention to invoke its power to an extent similar to that which Congress has done in the National Labor Relations Act, and where such power is invoked in the public interest, as it is in the National Labor Relations Act, the agency vested with such power has no general grant of permissive authority as to whether or not it will exercise it though it may, and often does, have a general discretion in the manner of affirmative exercise.

In *Jacobsen v. N. L. R. B.,* 120 F. 2d 96 (C. A. 3, 1941), a decision was made which virtually rules the question in this case. There, after involved and prolonged proceedings of unfair labor practice charges against an employer, the Board dismissed the complaint because it could not determine from the record if it had jurisdiction. The decision of the Board stated:

> " 'We are of the opinion that the facts set forth in the record are not sufficiently developed to afford a basis for determining whether or not the operations of the respondent affect commerce, within the meaning of the Act. Under such circumstances we ordinarily would dismiss the complaint without prejudice. However, in view of the long period of time which has elapsed since the filing of the charges and the nature of the proceedings heretofore had, the Board, acting within the discretion granted it by Section 10 of the Act, does not deem it advisable to reopen the record upon this point. We shall, therefore, dismiss the complaint in its entirety.' " (Pp. 98-99.)

Thereafter, the petitioner's petition to reopen before the Board was denied, and a petition to review was filed in the Court of Appeal seeking to reverse the order of the

Board dismissing the complaint. The court remanded the matter to the Board clearly holding that since the jurisdiction of the Board was invoked, it must decide if it has jurisdiction and if it finds that it does have jurisdiction it must determine the unfair labor practice charges. It is apparent from the decision of the court that the Board's claim of discretion figured largely in the arguments before the court because the court stated:

> "We have dealt with the ramifications in this case in such detail because the questions presented are those both of jurisdiction and discretion." (P. 99.)

In holding that the Board must determine its jurisdiction and thereafter determine the question of unfair labor practices, the court stated:

> "The Board is the judge of the facts and if its findings are supported by substantial evidence we must accept them. It has made no finding upon the fundamental issue of commerce affected. The Board took inconsistent positions. It stated that the record did not afford a basis for determining whether the operations of Protective Motor Service Company affect commerce within the meaning of the act and then, in an exercise of discretion, refused to receive additional evidence upon this very pertinent issue. Aside from any question presented as to the right of the petitioners to adduce additional evidence, *the Board, having issued its complaint and proceeded to hearings, had the duty to decide in limine whether or not the operations of the Protective Motor Service Company affected commerce within the meaning of the act, and in our opinion it was error for the Board not to do this.*" (Emphasis added.) (Pp. 100-101.)

* * * * * * * *

> "Accordingly a decree will be entered setting aside the order of the Board and remanding the cause with directions to reinstate the complaint, to allow the petitioners a reasonable opportunity to present the evidence referred to in their petitions, and to determine the issue of interstate commerce, *and if it be found that the operations of Protective Motor Service do affect commerce within the purview of the act, to determine whether or not that company has engaged in unfair labor practices and to issue an appropriate order in respect thereto.*" (Emphasis added.) (P. 101.)

It is true that the court in the *Jacobsen* case did not have the same question before it as is involved in this proceeding. It could not, of course, because at that time the General Counsel's office did not exist. However, the opinion, fairly construed, is a determination that when the jurisdiction of the Board is invoked the Board has the duty of first determining its jurisdiction in fact; secondly, if it has jurisdiction, to determine the unfair labor practice question; and thirdly, if it finds unfair labor practices have been committed, issue an appropriate order with respect to them.

In *M and M Wood W. Co. v. Plywood & Veneer W. L. U. No. 102,* 23 Fed. Supp. 11 (D. C. Ore. 1938), a temporary injunction was sought to enjoin a dispute between factions of a union. This injunction was denied, the court observing that a National Labor Relations Board complaint had been filed in the matter and stating:

> "Although the Board was thus vested with all the power to intervene which it now possesses, no motion was made by it to construe the contract and relieve the people of the state from the insensate strife. The

power to settle controversy by administrative action *carries with it the responsibility to act.*" (Emphasis added.) *M and M Wood W. Co. v. Plywood & Veneer W. L. U. No. 102,* 23 Fed. Supp. 11, 19 (D. C. Ore. 1938).

Contrary to the Board's assertion of discretion as to whether it will or will not act, principles applicable to such an agency indicate that a permissive authority in it to act is not to be readily inferred. In fact, it is generally held that an agency vested with power to act in the public interest has the obligation of acting whenever its jurisdiction is invoked.

In *Supervisors v. United States,* 4 Wall. (U. S.) 435, 18 L. Ed. 419 (1866), it is stated:

"That act declares that 'the board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may, if deemed advisable,* levy a special tax, * * *" (P. 445.)

* * * * * * * *

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

"In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'

"The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category." (Pp. 446-447.)

This claim of discretion on the part of the Board is also inconsistent with the intent of Congress to give it only quasi-judicial functions in unfair labor practice cases. A judicial body does not have a discretion as to whether it will or will not exercise its jurisdiction. This has been declared many times with respect to various courts. The principle was originally recognized by Chief Justice Marshall in *Cohens v. Virginia,* 6 Wheat. 264, where it was stated:

"We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."

In *Willcox v. Consolidated Gas Co.,* 212 U. S. 19, 40, 53 L. Ed. 382, 394 (1909), it was held that:

"When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * * *That the case may be one of local interest only is entirely immaterial,* * * *" (Emphasis added.)

Also see *Ex parte United States,* 287 U. S. 241, 250, 77 L. Ed. 283, 287 (1932):

> "* * * the power to enforce does not inherently beget a discretion permanently to refuse to enforce, * * *"

In numerous cases an agency has neglected to exercise its jurisdiction upon the mistaken belief that it did not have jurisdiction. In such cases the courts have not been hesitant to issue a writ of mandamus against the agency requiring it to assume and exercise its jurisdiction at once.

I. C. C. v. Humboldt S. S. Co., 224 U. S. 474, 489, 56 L. Ed. 849 (1912);

Louisville Cement Co. v. I. C. C., 246 U. S. 638, 62 L. Ed. 914 (1918);

U. S. ex rel. CG. W. R. Co. v. I. C. C., 294 U. S. 50, 60, 61, 79 L. Ed. 752 (1935);

Jacobsen v. N. L. R. B., 120 F. 2d 96 (C. A. 3, 1941).

An interesting case for the question before the court is *Village of Bridgeport v. Public Service Commission,* 125 W. Va. 342, 24 S. E. 2d 285 (1943), which was a petition for mandamus to require defendants to dispose of a complaint filed with it by petitioner. This complaint sought to restore tolls on a bridge. It appeared that negotiations were under way for transfer of title to the bridge and defendant refused to act upon the complaint until such negotiations were completed, finding:

> " 'The Commission is of the opinion that a determination by it at this time of the issues presented, would serve no useful purpose, would be without any practical effect, and upon the delivery of said bridges

to the State Road Commission of West Virginia, would not be binding upon that body, and for the reasons herein stated the Commission declines to determine the issues presented until a final disposition has been made of the aforesaid pending transactions relating to the sale of said bridges.

" 'This proceeding is continued to a date hereafter to be fixed by the Commission.' " (P. 287.)

The court, after finding defendant had power to regulate the tolls, found its refusal to exercise such power unlawful.

"In discharging the functions required by the statute of its creation and subsequent related acts, the Public Service Commission is dealing with instrumentalities that certainly affect the public interest and welfare in many vital ways, and we believe it is quite apparent, even though the legislative purposes are not expressed in its enactment relating to the Commission's duties, that the expeditious and prompt exercise of its powers is a necessarily implied requirement. The Commission is an administrative body whose duties demand the exercise of quasi judicial functions. It has no arbitrary discretion, so that its powers are not to be exercised in a manner that is controlled by what, in its judgment, the expediency of the situation with which it is confronted requires.

"Considering the powers vested in the Public Service Commission in the dual aspect of an administrative body exercising quasi judicial powers, in our opinion, the exercise of neither class of powers can be properly delayed for reasons which do not arise in the matter under consideration, no matter how closely, in the opinion of the acting agency, they may be related thereto. Certainly this is true of an administrative body and we believe that this conclusion

is borne out by the provisions of the act creating the Commission, by the terms of which the Commission is definitely required to act within a prescribed period in certain matters. See Code, 24-2-4. *That being so of administrative bodies and also true of judicial bodies* (Ault v. O'Brien, Judge, 121 W. Va. 705, 6 S. E. 2d 228; French v. Bennett, Judge, 69 W. Va. 653, 72 S. E. 746; see also, Ex parte Loring, 94 U. S. 418, 24 L. Ed. 165, and Hudson v. Parker, 156 U. S. 277, 288, bottom, 15 S. Ct. 450, 39 L. Ed. 424), *we believe that it necessarily follows that the same rule applies to an administrative body exercising quasi judicial functions* (Wiley and Booker v. County Court, 111 W. Va. 646, 163 S. E. 441), *and that it is not the right of such a body to suspend unduly, by awaiting the alternative occurrence of a future event, the exercise of its proper function.* While this court will not suggest the course of conduct to be pursued by a different division of the state government, nevertheless, where its refusal to act is admittedly based upon expediency and is, in fact, an arbitrary disregard of what otherwise would be its ordinary duty, plainly we are required to act." (Emphasis added.) (Pp. 287-288.) *Village of Bridgeport v. Public Service Commission,* 125 W. Va. 342, 24 S. E. 2d 285 (1943).

In *Commonwealth v. Frost,* 295 Ky. 137, 172 S. W. 2d 905 (1943), the court quotes approvingly as follows from 42 Am. Jur., Public Administrative Law, Section 69:

"'Administrative officers may lawfully be vested with a large measure of discretion in exercising their powers, but this discretion must be exercised in accordance with established principles of justice and not arbitrarily or capriciously, fraudulently, or without factual basis. Discretion of administrative officers does not extend to permitting them to ignore or trans-

gress limitations upon their power. Where power is conferred upon an administrative board and its exercise is made mandatory, there is no discretion as to whether, in good faith and in accordance with the legislative will, the power shall be exercised, although there may be discretion as to the manner of its exercise. When the only right of an individual or the public which the law gives is that which a designated officer deems best, the honest decision of that officer is the measure of the right.'" (P. 909.) *Commonwealth v. Frost,* 295 Ky. 137, 172 S. W. 2d 905 (1943).

It would be impossible to consider all of the cases holding that an administrative agency has no discretion as to whether it will act, and that language vesting power in an agency which is permissive in form is to be construed as mandatory where the powers exercised relate to the public interest. The following are only a number of such cases:

Hotel Casey Co. v. Ross, 343 Pa. 573, 23 Atl. 2d 737 (1942) (Holding that the term "empowered", while generally considered permissive, is mandatory in such cases);

Posey v. Board of Education, 199 N. C. 306, 154 S. E. 393, 70 A. L. R. 1306 (1930);

New York State Society, Etc. v. Educational Dept., 262 App. Div. 602, 31 N. Y. S. 2d 305 (1941);

Lincoln Nat. Life Ins. Co. v. Fischer, Commissioner of Insurance, 235 Ia. 506, 17 N. W. 2d 273 (1945);

People v. Sisson, 222 N. Y. 387, 118 N. E. 789 (1918);

Brooke v. Moore, 60 Ariz. 551, 142 P. 2d 211 (1943);

Pearce v. North Dakota Workmen's Comp. Bureau, 67 N. D. 512, 274 N. W. 587 (1937);

Novak v. Novak, 74 N. D. 572, 24 N. W. 2d 20 (1946);

First Nat. Bank v. School Dist., 173 Minn. 383, 217 N. W. 366 (1928);

People v. Common Council, 140 N. Y. 300, 35 N. E. 485 (1893);

Dupont v. Mills, 9 Harr. 42, 196 Atl. 168, 119 A. L. R. 174 (Del. 1937).

It would seem, therefore, that the Board's claim to a discretion as to whether it will act, so far as it is based on Section 10 of the Act, is one which has no support from that section but, on the contrary, the section is actually mandatory in form so far as concerns the Board. So far as such claim of discretion is based upon general principles applicable to administrative agencies, it is clear from the above authorities that this claim is without support. In fact, it is established that, quite to the contrary, an administrative agency has no more discretion as to whether it will exercise its jurisdiction than does a court. The only distinguishing feature of an administrative agency is its usual possession of a large discretion in the manner in which it exercises its jurisdiction, a discretion not usual in the courts. The Board can no better justify its action upon a claim of discretion as to whether it will act than it could claim to have the right to review the General Counsel's issuance of a complaint, which right, of course, the Board expressly admits it does not have. The Board's dismissal of the complaint in the instant case then was erroneous, not only because it was in fact a review, but because there is no discretionary power otherwise on which to base such action.

V.

Subsequent Legislative History of the Labor Management Relations Act of 1947 Fully Indicates That Congress Intended the General Counsel to Act Independent of the Board and Without Any Type of Review by the Board.

In some instances the legislative history of an Act occurring subsequent to its enactment is as disclosing of the intent of Congress as the legislative history prior to its enactment. As will be discussed hereafter the subsequent history of this Act with reference to the General Counsel involves a Reorganization Plan by the President which would have returned the functions of the General Counsel to the control of the Board. This Plan was defeated by Congressional action. The ability of the court to consider events subsequent to the enactment of the statute is clear.

In *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 85 L. Ed. 881 (1941), the Federal Trade Commission contended it had power to regulate purely intrastate sales which have an affect on interstate sales. The court held it had no such power over local business as the statute gave authority over interstate sales only. The court points out that this conclusion is supported by the fact that the commission never previously claimed such authority and also:

> "This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant of authority over transactions 'affecting' commerce in addition to its control of practices in commerce. S. Rep. No. 46, 74th Cong. 1st Sess." *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 85 L. Ed. 881, 884 (1941).

In *Sioux Tribe of Indians v. United States,* 316 U. S. 317, 329-330, 86 L. Ed. 1501, 1509 (1942), it seems that five years after the statute was enacted the same Congressional Committee which previously reported the statute made a report as to its meaning. With respect to the construction of this statute the court held that this statement by the same committee was virtually conclusive on the court.

In *Great Northern R. Co. v. United States,* 315 U. S. 262, 277, 86 L. Ed. 836, 844 (1942), the court holds that subsequent legislation may be considered as an aid in interpreting prior statutes, citing several cases for the proposition.

On March 13, 1950, the President submitted to Congress various plans of reorganization for a number of administrative agencies. Among these was Plan No. 12 which would have abolished the office of the General Counsel and transferred certain of his functions to the Chairman of the Board and to the full Board. These plans were submitted pursuant to the Reorganization Act of 1949 and according to the provisions of that Act would have become law after sixty days if neither House of Congress within that time voted to disapprove the Plan.

The Presidential messages accompanying these plans, the plan itself, and the Senate Committee Report with respect to Plan No. 12 are reproduced in the Appendix, pages 15-31. It will be observed that the President states that Plan No. 12 seeks to restore unified responsibility (App. p. 16) in the National Labor Relations Board by abolishing the office of the General Counsel and transferring his functions to the Board and Chairman. The President also stated (App. pp. 17-18) that Reorganization

Plan No. 12 would terminate the present division and confusion of responsibility in the National Labor Relations Board by abolishing the office of the General Counsel.

Reorganization Plan No. 12 itself (App. pp. 20-21) apparently would have transferred the General Counsel's supervisory and administrative functions to the Chairman (Section 1) and would have transferred other functions of the General Counsel, among them the prosecuting function and the issuance of complaints, to the full Board (Section 3).

After submission of these plans to Congress, Senator Taft introduced Senate Resolution 248 to disapprove Reorganization Plan No. 12, which resolution was referred to the Committee on Expenditures in the Executive Department (96 Cong. Rec. 4641). In the House, Resolution No. 516 was also introduced for the purpose of disapproving Reorganization Plan No. 12, which was referred to the House Committee on Expenditures in the Executive Department (96 Cong. Rec. 3754).

The Senate Committee reported favorably on Senate Resolution 248 (96 Cong. Rec. 5632); that is, recommended that the Resolution disapproving Reorganization Plan No. 12 be passed. This Committee submitted a report, Senate Report No. 1516, excerpts from which are set out in the Appendix, pages 22-31. This report states that Plan No. 12 in seeking to abolish the General Counsel's office is contrary to the policy expressed by Congress in the 1947 Amendments. The Senate Committee states this intent of Congress by quoting from the Conference Report on the Labor Management Relations Act of 1947

(H. Rep. No. 510, 80th Congress, 1st Session, p. 37), to the effect that the General Counsel would have final authority in respect of the investigation of charges and issuance of complaints and in the prosecution of such complaints before the Board, and that such would be independent of any "direction, control, or review by, the Board . . ." (see App. p. 26). This report also discloses (App. pp. 27-28) that it was desired that the authority of the General Counsel to issue complaints be without any type of review by the Board. The fact that Congress intended that the Board act only as a judicial agency, having nothing whatsoever to do with the functions incident to the prosecution, is evidenced throughout the report. The Minority Report (App. p. 31), while advocating approval of the Presidential Reorganization Plan No. 12, admits that the General Counsel has "final unreviewable authority to issue unfair labor practice complaints" on behalf of the Board (App. p. 31).

After submission of this report the Senate voted to disapprove Reorganization Plan No. 12, thereby continuing the office of the General Counsel in effect (96 Cong. Rec. 6967). This action of Congress is further evidence of its intent that the office of the General Counsel be one essential to its statutory scheme of the separation of the powers and functions of the Board. Congress thereby reaffirmed that the General Counsel was desired by it to be completely independent and free of any control or influence of the Board in the performance of the functions delegated to him by Congress.

Conclusion.

In the Board's decision it is pointed out [R. 57] that the Supreme Court has held that the Board may withhold or dismiss its complaint if it should appear that the union presenting the charge has engaged in such a course of violence as to constitute an abuse of the Board's process. From this the Board contends that it may now dismiss a complaint for policy reasons, the policy being that it does not see fit to exercise its jurisdiction in local businesses. The Board also points out other instances [R. 59, footnote 10] in which it has dismissed "unfair labor practice allegations" for policy reasons.

It is not necessary to consider here whether the Board has discretion to dismiss a complaint for policy reasons in any of these cases cited by the Board in its decision. It will be observed that in all those cases the policy effectuated by the dismissal of the complaint was one directly connected with eradicating the results of unfair labor practices and affirmatively effectuating the policies of the Act. The policy of the Act, of course, is to remove the causes of interferences which are obstructions to commerce. Where it appears during the hearing that the parties have made an agreement settling a strike and unfair labor practice charges together, the Board may be entitled to hold that it effectuates the policy of the Act, the settlement of labor disputes, to encourage such settlement agreements by dismissing the complaint which would reopen the dispute previously settled. The Board also may be entitled to hold that though a respondent has been guilty of unfair labor practices, the conduct of the charging party is equally unlawful and such that to give any relief to him would actually fly in the face of the policy of the

Act rather than effectuating such policy. In such cases the Board may be able to make such findings as would entitle it to dismiss the complaint despite the existence of jurisdiction and even of unfair labor practices. In all of such cases it is apparent that the policy invoked by the Board in dismissing the complaint is one relating to the settlement of labor disputes, or one pointed to the end of eliminating arbitrary or unlawful action by the charging party. Those policies may be attributed to the Board's discretion to so frame its order as to effectuate the policies of the Act because such effectuation is in a positive, affirmative manner representing an exercise of the Board's jurisdiction toward the end of eliminating the causes of labor disputes and obstructions to commerce.

In the instant case the policy motivating the dismissal of the complaint was in no way related to removing causes of labor disputes or obstructions to commerce. The distinction then between the ability of the Board to dismiss a complaint for policy reasons in the cases considered above and in the instant case is apparent. The dismissal of a complaint upon the policy ground that the business is local has nothing whatsoever to do with effectuating the policy of the Act. It is a refusal to consider whether the policy of the Act has been contravened in the instant case.

With respect to such cases it is submitted that Section 3 (d) of the Act establishes in the General Counsel an authority to determine the choice of cases which shall go to the Board for decision; that such authority is a final authority so far as concerns the Board without any right in the Board to review or reverse the issuance of complaints. Such was the evident intent of Congress and such is also the principle, applicable to quasi-judicial agencies such as the Board. A holding that Congress intended

that the Board have authority to review the issuance of complaints or to determine the choice of cases to be presented to it is to render nugatory Section 3 (d) of the Act establishing the final authority of the General Counsel and would also mean a statutory scheme of administration which would be unreasonable in application and resulting in conflicts of authority rather than a division of authority. Such holding would mean that Congress has not achieved its admitted purpose of separating the functions of the Board, but on the contrary, would mean that the Board is still the determinant of what it will prosecute and what it will decide. Clearly, Congress sought to put an end to such administration.

Dated: June 21, 1950.

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APPENDIX.

[PUBLIC LAW 101—80TH CONGRESS]
[CHAPTER 120—1ST SESSION]
[H. R. 3020]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY
[29 U. S. C. A., Sec. 141]

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their re-

lations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Title I—Amendment of National Labor Relations Act

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES
[29 U. S. C. A., Sec. 151]

"Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not posses full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

[29 U. S. C. A., Sec. 152(6), (7)]

* * * * * * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * * * *

"NATIONAL LABOR RELATIONS BOARD
[29 U. S. C. A., Secs. 153, 154]

"Sec. 3. (a) The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

"(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President

stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

"Sec. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a

legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

* * * * * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

[29 U. S. C. A. Sec. 160]

"SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than

mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall

have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be,

responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

SECTION 4 OF H. R. 3020 AS REPORTED BY THE HOUSE COMMITTEE ON EDUCATION AND LABOR AND AS PASSED BY THE HOUSE OF REPRESENTATIVES, 80TH CONGRESS, 1ST SESSION, ESTABLISHING THE OFFICE OF ADMINISTRATOR OF THE NATIONAL LABOR RELATIONS ACT.

"ADMINISTRATOR OF THE NATIONAL LABOR RELATIONS ACT.

"Sec. 4. There is hereby established as an independent agency in the executive branch of the Government an office of Administrator of the National Labor Relations Act (in this Act called the 'Administrator'). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, with reference to his fitness to perform the functions imposed upon him by this Act in a fair and impartial manner, and shall receive compensation at the rate of $12,000 per annum. He shall not engage in any other business, vocation, or employment. The Administrator may establish or utilize such regional, State, local, or other agencies as may from time to time be needed. The Administrator may appoint such officers and employees as he may from time to time find necessary to assist him in the performance of his duties, except that the heads of the regional offices and the chief legal officer in each of such offices shall be appointed by the President, by and with the advice and consent of the Senate. Attorneys appointed under this subsection may, in the discretion of the Administrator, appear for and represent the Administrator in any case in court. In case of a vacancy in the office of the Administrator,

or in case of the absence of the Administrator, the President shall designate the officer or employee of the Administrator who shall serve as Administrator during such vacancy or absence. Expenses of the Administrator, including all necessary traveling and subsistence expenses incurred by the Administrator or employees of the Administrator under his orders while away from his or their official station, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Administrator or by any employee he designates for that purpose. It shall be the duty of the Administrator, as hereinafter provided, to investigate charges of unfair labor practices, to issue complaints if he has reasonable cause to believe such charges are true, to prosecute such complaints before the Board, to make application to the courts for enforcement of orders of the Board, to investigate representation petitions and conduct elections under section 9, and to exercise such other functions as are conferred on him by this Act. The Administrator shall be made a party to all proceedings before the Board under section 10, and shall present such testimony therein and request the Board to take such action with respect thereto as in his opinion will carry out the policies of this Act."

SECTION 3 OF H. R. 3020 IN THE FORM IN WHICH IT PASSED THE SENATE, 80TH CONGRESS, 1ST SESSION, PROVIDING FOR THE ORGANIZATION OF THE NATIONAL LABOR RELATIONS BOARD AND DELETING THE ESTABLISHMENT OF THE OFFICE OF THE ADMINISTRATOR AS CONTAINED IN H. R. 3020 AS PREVIOUSLY PASSED THE HOUSE.

"NATIONAL LABOR RELATIONS BOARD

"Sec. 3. (a) There is hereby created a board, to be known as the 'National Labor Relations Board' (hereinafter referred to as the 'Board'), which shall be composed of seven members, who shall be appointed by the President, by and with the advice and consent of the Senate. Of the four additional members, whose positions on the Board are established by this amendment, two shall be appointed for terms of five years, and the other two for terms of two years. Their successors, and the successors of the other members, including those presently serving as members shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not

impair the right of the remaining members to exercise all of the powers of the Board, and four members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

"(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed."

EXCERPTS FROM VOLUME 96 CONGRESSIONAL RECORD, 81ST CONGRESS, 2ND SESSION, RELATING TO THE SUBMISSION BY THE PRESIDENT TO THE CONGRESS OF CERTAIN PLANS FOR REORGANIZATION OF ADMINISTRATIVE AGENCIES, AMONG THEM PLAN NO. 12 FOR THE REORGANIZATION OF THE NATIONAL LABOR RELATIONS BOARD.

GENERAL REORGANIZATION PLANS—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. DOC. NO. 503)

The SPEAKER laid before the House the following message from the President of the United States, which was read, and, together with the accompanying papers, referred to the Committee on Expenditures in the Executive Departments and ordered to be printed:

To the Congress of the United States:

I am today transmitting to the Congress 21 plans for reorganization of agencies of the executive branch. These plans have been prepared under the authority of the Reorganization Act of 1949. Each is accompanied by the message required in that act. (P. 3289.)

* * * * * * * * *

In regard to the regulatory agencies, the plans distinguish between two groups of functions necessary to the conduct of these agencies. One group includes the substantive aspects of regulation—that is, the determination of policies, the formulation and issuance of rules, and the adjudication of cases. All these functions are left in the board or Commission as a whole. The other group of functions comprises the day-to-day direction and internal administration of the complex staff organizations which the Commissions require. These responsibilities are trans-

ferred to the chairmen of the agencies, to be discharged in accordance with policies which the Commissions may establish. The chairman is to be designated in each agency by the President from among the Commission members.

In plan No. 12, unified responsibility is once more established in the National Labor Relations Board by transferring to the Board and its Chairman the functions of the general counsel and by abolishing the statutory office of the general counsel. This plan will bring to an end the confusion which has resulted from divided responsibility. (P. 3290.)

* * * * * * * * *

REORGANIZATION PLANS NOS. 1 TO 13 OF 1950—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. DOC. NO. 504)

The SPEAKER laid before the House the following message from the President of the United States, which was read, and, together with the accompanying papers, referred to the Committee on Expenditures in the Executive Departments and ordered to be printed:

To the Congress of the United States:

I am transmitting today Reorganization Plans Nos. 1 to 13 of 1950, designed to strengthen the management of six executive departments and seven regulatory commissions. These plans propose a major clarification of the lines of responsibility and authority for the management

of the executive branch. They would put into effect the principal remaining recommendations of the Commission on Organization of the Executive Branch of the Government affecting the location of management responsibility within the departments and agencies.

A principal finding of the Commission on Organization was that clean-cut lines of authority do not exist in the executive branch. The Commission stated that "the first and essential step in the search for efficiency and economy in the executive branch of the Federal Government" is to correct the present diffusion of authority and confusion of responsibility. The Commission warned that without this action "all other steps to improve organization and management are doomed to failure."

Reorganization Plans Nos. 1 to 13 propose a bold approach to the problem of delineating responsibility and authority for the management of the executive branch. Clearer lines of responsibility and authority will strengthen our constitutional system and will also help to establish accountability for performance in office—a basic premise of democratic government. I urge the Congress to add its approval to my acceptance of these recommendations of the Commission on Organization. (P. 3291.)

* * * * * * * * *

Reorganization Plan No. 12 terminates the present division and confusion of responsibility in the National Labor Relations Board by abolishing the office of the General Counsel of the Board. The Senate last year in-

dicated its approval of this step. The reorganization plan in effect restores unified authority and responsibility in the Board. As in the case of the other plans for regulatory agencies, certain administrative and executive responsibilities are placed in the Chairman. The relationship between the Board and the Chairman is identical with that provided for the other regulatory agencies. This action eliminates a basic defect in the present organization of the National Labor Relations Board and provides an organizational pattern consistent with that established for the other regulatory agencies. (P. 3292.)

* * * * * * * * *

REORGANIZATION PLAN NO. 12 OF 1950 (NATIONAL LABOR RELATIONS BOARD)—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. DOC. NO. 516)

The SPEAKER laid before the House the following message from the President of the United States, which was read, and, together with the accompanying papers, referred to the Committee on Expenditures in the Executive Departments and ordered to be printed:

To the Congress of the United States:

I transmit herewith Reorganization Plan No. 12 of 1950, prepared in accordance with the Reorganization Act of 1949 and providing for reorganizations in the National Labor Relations Board. My reasons for transmitting this plan are stated in an accompanying general message.

After investigation I have found and hereby declare that each reorganization included in Reorganization Plan No. 12 of 1950 is necessary to accomplish one or more of the purposes set forth in section 2 (a) of the Reorganization Act of 1949.

The taking effect of the reorganizations included in this plan may not in itself result in substantial immediate savings. However, many benefits in improved operations are probable during the next years which will result in a reduction in expenditures as compared with those that would be otherwise necessary. An itemization of these reductions in advance of actual experience under this plan is not practicable.

HARRY S. TRUMAN.

THE WHITE HOUSE, *March 13, 1950.* (P. 3295.)

Reorganization Plan No. 12 of 1950

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949. (H. Doc. No. 516, 81st Congress, 2nd Session.)

National Labor Relations Board

Section 1. *Transfer of functions to the Chairman.*—(a) Subject to the provisions of subsection (b) of this section, there are hereby transferred from the National Labor Relations Board, hereinafter referred to as the Board, and from the General Counsel of the Board, to the Chairman of the Board, hereinafter referred to as the Chairman, the executive and administrative functions of the Board and of the General Counsel, including their functions with respect to (1) the appointment and supervision of personnel, (2) the distribution of business among personnel and among administrative units, and (3) the use and expenditure of funds.

(b) (1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Board and by such regulatory decisions, findings, and determinations as the Board may by law be authorized to make.

(2) The appointment by the Chairman of the heads of major administrative units under the Board shall be subject to the approval of the Board.

(3) Personnel employed regularly and full time in the immediate offices of members of the Board other than the Chairman shall not be affected by the provisions of this reorganization plan.

(4) There are hereby reserved to the Board its functions with respect to revising Budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

Sec. 2. *Performance of transferred functions.*—The Chairman may from time to time make such provisions as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any function transferred to the Chairman by the provisions of this reorganization plan.

Sec. 3. *Transfer of functions to Board.*—All functions of the General Counsel of the Board not transferred by the provisions of section 1 of this reorganization plan are hereby transferred to the Board. The office of such General Counsel (provided for in section 3(d) of the National Labor Relations Act, as amended, 29 U. S. C. 153(d) is hereby abolished.

EXCERPTS FROM SENATE MAJORITY REPORT NO. 1516, 81ST CONGRESS, 2ND SESSION OF SENATE EXECUTIVE EXPENDITURES COMMITTEE ON SENATE RESOLUTION 248, A RESOLUTION TO DISAPPROVE THE PRESIDENT'S PROPOSED REORGANIZATION PLAN NO. 12.

Mr. McClellan, from the Committee of Expenditures in the Executive Departments, submitted the following

REPORT

[*To accompany S. Res. 248*]

The Committee on Expenditures in the Executive Departments to whom was referred Senate Resolution 248, expressing disapproval of Reorganization Plan No. 12 of 1950 (Reorganization of the National Labor Relations Board), having considered the same, report favorably thereon, and recommend that the resolution do pass. The effect of the adoption by the Senate of Senate Resolution 248 will be to prevent Reorganization Plan No. 12 of 1950 from becoming effective.

The Committee in executive session on April 17, 1950, took favorable action upon Senate Resolution 248 by a vote of 9 to 4. Members of the committee voting in the affirmative were: Senators McClellan (chairman), Eastland, Hoey, O'Conor, McCarthy, Mundt, Smith of Maine, Schoeppel, and Vandenberg. Members voting against the resolution were: Senators Humphrey, Leahy, Benton and Ives.

Summary of Committee's Findings.

The committee conducted public hearings upon Senate Resolution 248, receiving testimony from nine witnesses in behalf of the approval of the resolution, and three against it. In reporting the resolution of disapproval favorable, the committee agreed substantially with the following points raised by opponents of plan No. 12:

1. The plan repudiates a policy overwhelmingly expressed by Congress as recently as 1947.

2. The plan would destroy public confidence in the impartiality of the administration of laws regulating labor-management relations.

3. The plan would return the National Labor Relations Board to the discredited role of grand jury, prosecutor, and judge.

4. The plan is defective in that it fails to specifically provide where the most important functions of the General Counsel are to be lodged.

5. The plan goes beyond the Hoover Commission's recommendations affecting the Government's regulatory agencies. The Hoover Commission made no specific recommendation concerning the National Labor Relations Board.

6. The plan would not accomplish the objectives of the Reorganization Act of 1949 relating to efficiency and economy.

7. The plan, by concentrating the functions of grand jury, prosecutor, and judge in the Chairman and Board, is contrary to sound principles of Government.

8. The plan provides no satisfactory remedy for the alleged deficiencies in the present law such as questions

relating to jurisdiction, appointment of personnel, and appeals from refusal to issue unfair labor practice complaints.

9. The plan, by giving the Board many additional duties, would further delay its decision of cases.

10. The plan would subject the Board to pressures and influences in case-handling at the initial stage.

11. The plan would bring about extensive litigation pending tests of its legality in the courts.

12. The plan would not effectuate any substantial economy. The President transmitted to the Senate and the House of Representatives in Congress assembled, on March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949 (Public Law 109, 81st Cong.), Reorganization Plan No. 12 of 1950, providing for reorganization of the National Labor Relations Board. (The plan, and the President's message which accompanied it, are included as appendices at the end of this report.)

* * * * * * * * *

(2) *The NLRB under the Taft-Hartley Act*

In 1947 Congress enacted the Taft-Hartley Act (Public Law 101, 80th Cong., 1st sess.). The bill passed by the House of Representatives created an independent office of Administrator of the National Labor Relations Act and gave the Administrator all investigative and prosecuting functions. The Senate bill, while not divorcing the prosecution from the judicial functions of the Board, in a number of ways sought to improve the judicial function of the Board. For example the Board's review section was abolished in order that the decisions of the Board might be those of the Board members rather than those of an

unidentified group of lawyers. Other protections were provided to insure that the report and recommendation of a trial examiner were his alone and not dictated by some unidentified supervisor.

Statutory Background of the General Counsel

The conferees on the bill (H. R. 3020) adopted a new section (sec. 3 (d)), establishing the Office of General Counsel of the National Labor Relations Board. Its provisions are as follows:

Sec. 3. (d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

The intent of Congress with respect to the independence of the General Counsel was made clear by the statement of the House managers accompanying the conference report on H. R. 3020, as follows.[1]

* * * * * * * * *

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[1]Conference report, Labor-Management Relations Act, 1947 (H. Rept. No. 510, 80th Cong., 1st sess., p. 37).

"The conference agreement does not make provisions for an independent agency to exercise the investigating and prosecuting functions under the act, but does provide that there shall be a General Counsel of the Board, who is to be appointed by the President, by and with the advice and consent of the Senate, for a term of 4 years. The General Counsel is to have general supervision and direction of all attorneys employed by the Board (excluding the trial examiners and the legal assistants to the individual members of the Board), and of all the officers and employees in the Board's regional offices, and is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board. He is to have, in addition, such other duties as the Board may prescribe or as may be provided by law. By this provision responsibility for what takes place in the Board's regional offices is centralized in one individual, who is ultimately responsible to the President and Congress."

Soon after passage of the act, the Board and the General Counsel entered into an agreement whereby certain powers of the Board were delegated to the General Counsel. In general the delegation carried out the intent of Congress as expressed in the legislative history of the Taft-Hartley Act of confining the Board to the function of deciding cases and conferring on the General Counsel

the duties of prosecutor and administrator. For example, the General Counsel was given appointment and removal power over the regional office personnel which he supervised and he was given the function of seeking enforcement of Board orders in the courts after the Board had decided to seek such an order.

The regional offices have continued to operate in a manner similar to that followed under the Wagner Act except that all personnel are now supervised by and responsible to the General Counsel. On unusual questions the regional director is required to seek advice from Washington before issuing complaint. To handle these advice requests, the General Counsel has created a committee composed of the chiefs of several of his departments. This committee briefs the facts and law involved and reports to the General Counsel who determines whether complaint shall issue. When a charging party seeks to appeal from a decision of the regional director refusing to issue complaint the appeal is processed by this same committee for the General Counsel's decision.

Thus, the procedure for handling "requests for advice" and "appeals from refusal to issue complaint" is almost identical with that employed by the Board when it had the prosecuting as well as the judicial function. Proponents of the plan list the fact that there is no appeal from the General Counsel's refusal to issue complaint as a most compelling reason for abolition of the General Counsel and return to the old system. We cannot accept their rea-

soning. There is no appeal to the courts now, nor would there *by* if the plan were adopted. It is argued that there is less chance for arbitrary and capricious action when the decision is made by five men. It may well be answered that one man solely responsible with the spotlight of publicity directly on him, knowing that he may be removed from office, is not going to be arbitrary about refusing to issue complaints. Furthermore, the General Counsel has established his own advisory staff so that decisions are made only after consultation with and upon the advice of competent experts. It seems to us that if there is a possibility of abuse here the remedy might be an appeal to the courts from the General Counsel's denial of the appeal from the regional director's refusal to issue complaint. But that matter is not before us. The Senate must take plan No. 12 without change or turn it down. On that basis, while we agree that there may be some merit in consideration of such appeals by five men rather than one, when it is considered that those five men must later decide the case, we believe that the procedure under present law is far superior on all counts to that provided by the plan.

During his testimony, the Chairman of the NLRB stated that in the event the plan is adopted, the Board might appoint an administrator to pass upon "requests for advice" and create a committee of high staff personnel to analyze "appeals" and present them to the Board as "hypothetical" cases.

We believe it preferable to have decisions made by a man appointed by the President with confirmation by the Senate than by an unidentified Board appointee or committee who would be subservient to the Board. Nor, do we believe it would be possible to keep any important case in a "hypothetical" role.

Some proponents insist that the greater part of the duties of the Board are administrative rather than judicial. We do not believe that those who appear before the Board so regard them, for several important reasons. In both complaint and representation cases a hearing is held before a trial examiner with all parties usually represented by counsel. Briefs are filed with the Board and oral argument is often granted. In representation cases the Board's decision as to appropriate unit and eligibility to vote may well decide whether the union can win the election and bargaining rights. In complaint cases the Board's order often imposes heavy financial responsibilities upon employers for back pay. Its negative orders (cease and desist) when enforced in the courts carry contempt-of-court sanctions when disobeyed.

We believe that the adoption of plan No. 12 and the resultant return to the Board of the dual functions of prosecutor and judge would destroy the public confidence which the Board has gained under the Taft-Hartley Act. We believe this would be true no matter how fair-minded the Board might be in the conduct of its affairs, because the Board performs its functions in an atmosphere charged with emotion, determining issues between parties hotly

contesting their rights and quick to claim bias on the merest suspicion that such exists. The return of the prosecuting function would be an insurmountable handicap to maintenance of the confidence of the litigants and the public.

* * * * * * * * *

The Plan Does Not Remedy Deficiencies in Present Act

Conflicting interpretations of the jurisdiction of the Board over small business is given as a major reason for abolition of the independent General Counsel. Witnesses stated that the General Counsel has asserted jurisdiction over many small enterprises thereby subjecting them to litigation only to have the matter dismissed when it finally reached the Board for decision. It is difficult to see how adoption of the plan would contribute much to a solution of this problem. The General Counsel has furnished the committee with a compilation of cases on jurisdiction. They definitely establish that the Board itself has no definite policy with respect to what businesses it holds to be covered by the Act. The decisions have been so inconsistent that no small-business man could possibly determine whether his business is covered. Without attempting to solve a problem which comes under jurisdiction of another committee of the Senate, this committee believes that the solution lies in the establishment by Congress of definite limits to the Board's jurisdiction or in provision for a means of determining jurisdiction at the initial stage.

EXCERPTS FROM MINORITY SENATE REPORT NO. 1516, 81ST CONGRESS, 2ND SESSION OF SENATE EXECUTIVE EXPENDITURES COMMITTEE ON SENATE RESOLUTION 248, A RESOLUTION TO DISAPPROVE THE PRESIDENT'S PROPOSED REORGANIZATION PLAN NO. 12.

In 1947, the Wagner Act was amended drastically by the Taft-Hartley law. Specified unfair labor practices by labor organizations are banned as well as unfair practices by employers. Additional types of employee elections are provided for.

The General Counsel is set up as an independent officer in the National Labor Relations Board with supervision over all attorneys except legal assistants to Board members and *with final unreviewable authority to issue unfair labor practice complaints* on behalf of the Board. The five-man Board set up under the 1947 act has sole control over representation elections but its function with respect to unfair labor practice complaints is limited to issuing decisions on records made after hearing upon complaints issued by the General Counsel. There is no recourse to the Board in respect of charges on which the General Counsel refuses to issue complaints. (Emphasis added.)

NO. 12446

In the United States Court of Appeals for the Ninth Circuit

H. W. SMITH, (d/b/a) A-1 PHOTO SERVICE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

IDA KLAUS,
Solicitor,
NORTON J. COME,
Attorney,
National Labor Relations Board.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of H. W. Smith, d/b/a A-1 Photo Service (hereinafter called "A-1 Photo" or "petitioner"), filed pursuant to Section 10 (f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151 *et seq.*), to review an order of the National Labor Relations Board. The Board's order (R. 59-60), which was issued in a proceeding under Section 10 of the Act, dismissed an unfair labor practice complaint (R. 80-87) that had been issued by the General Counsel of the Board upon charges filed by petitioner (R. 78-79). This Court has jurisdiction under Section 10 (f) of the Act, for petitioner transacts business in San Pedro, California, within this judicial circuit.

STATEMENT OF THE CASE

1. The initial stages of the unfair labor practice proceeding

On April 5, 1948, A-1 Photo filed an amended unfair labor practice charge with the Board's Regional Director for the Twenty-first Region. This charge, docketed as "Case No. 21-CB-34", alleged that Local 905 of the Retail Clerks International Association, AFL (hereinafter called "the Union"), and certain officials of the Union, were engaging in unfair labor practices within the meaning of Sections 8 (b) (1) (A), (2) and (3) of the Act[1]. (R. 2-3, 78-79.)

On April 7, 1948, the General Counsel of the Board, acting through the Regional Director and pursuant to Section 3 (d), issued an unfair labor practice complaint based upon the foregoing charge (R.80-87). A hearing was then held before a Trial Examiner, who issued his Intermediate Report on July 19, 1948 (R. 2-44).

The Trial Examiner found that the business involved was a retail store located in San Pedro, California; that the store was engaged in buying and selling photographic equipment and supplies, greeting cards and stationery; and that it regularly employed only three clerks (R. 7, 10). He further found that, during the period April 1947 through March 1948, this store purchased supplies totaling $100,146.69, of which 44 percent was obtained from wholesalers located outside the State of California. The balance of the supplies was purchased from wholesalers located in California, who, in turn, had obtained a sub-

[1]These and other relevant sections of the Act are set forth on pp. 54-65 of the Board's brief in *Haleston Drug Stores, Inc.*, v. *NLRB*, No. 12412, in this Court. Since the instant case and the *Haleston* case involve the same legal issue, this Court has consolidated them for purposes of oral argument.

stantial portion of such supplies from out-of-state. (R. 7-8.) During a comparable period, sales at the San Pedro store totalled $133,715.51, all of which, except for a minor quantity[2], were made to retail customers within the State of California (R. 9-10).

Upon these facts, the Trial Examiner concluded, contrary to the contention of respondent Union, that A-1 Photo was engaged in commerce within the meaning of the Act, and that therefore the Board, as a matter of law, had jurisdiction of the case (R. 10-11, 39). The Trial Examiner, however, noted that (R. 10-11):

> On occasion the Board has declined to exercise its jurisdiction over retail enterprises similar to that of the Employer, but such action has been based on policy considerations not properly within the province of the undersigned. The sole issue confronting the undersigned is whether the Board has jurisdiction over the case at bar, not whether, as a matter of public policy, it should assert it.

As to the merits, the Trial Examiner found that the Union and its Secretary, Haskell Tidwell, had refused to bargain collectively in violation of Section 8 (b) (3) of the Act, but had not committed any of the other unfair labor practices alleged in the complaint (R. 41). The Trial Examiner recommended an appropriate remedy for curing the violation of Section 8 (b) (3), and further recommended that the remainder of the complaint be dismissed (R. 41-43).

Both the Union and the General Counsel filed excep-

[2]Merchandise valued at approximately $600 was delivered to customers outside of California, and merchandise valued at about $2400 was sold and delivered to installations of the United States Army and Navy (R. 10).

tions to the Trial Examiner's Intermediate Report (R. 45-50).

II. The Decision and Order of the Board sought to be reviewed

On May 13, 1949, the Board, after considering the entire record in the proceeding and the exceptions of the parties, entered an order dismissing the complaint in its entirety (R. 51-60).

The Board accepted the commerce facts found by the Trial Examiner and did not disturb his conclusion therefrom that, as a matter of law, A-1 Photo was engaged in commerce within the meaning of the Act and thus subject to the jurisdiction of the Board (R. 51-53). However, the Board added (R. 53):

> It is clear to us ..... that the Employer's business is essentially local in nature and relatively small in size, and that interruption of his operations by a labor dispute could have only the most remote and insubstantial effect on commerce. Recently, we have dismissed several proceedings involving such enterprises, on the ground that the assertion of jurisdiction would not effectuate the purpose of the Act [footnote omitted]. The Respondents urge that we dismiss this proceeding for the same reason.

The Board then gave careful consideration to the General Counsel's contention that, "once he has issued a complaint in an unfair labor practice case, the Board Members have no authority to decline to assert jurisdiction on policy grounds, if jurisdiction in fact exists" (R. 53-58). The Board concluded, *inter alia*, that neither the provisions of Section 3 (d) of the amended Act nor the intention of Congress to effect a separation of the judicial and prosecuting functions of the agency deprived the

Board of the discretionary authority, which it had under the Wagner Act, "to dismiss complaints for policy reasons, even though commerce is affected" (R. 53-59).

The Board further concluded (R. 59):

> We believe that, in the absence of special circumstances, it is a proper exercise of such discretion to dismiss cases in which, as here, the business involved is so small and so local in nature that the interruption of operations by a labor dispute could have only a remote and insubstantial effect on commerce. We shall therefore dismiss this complaint in its entirety.

On June 16, 1949, the General Counsel requested the Board to reconsider its Decision and Order (R. 60-77).[3] On June 30, 1949, the Board denied this request, "for reasons stated in the said Decision and Order" (R. 77).

ARGUMENT

INTRODUCTION

As petitioner concedes (Br., pp. 4, 6), the sole issue here is whether, after the General Counsel of the Board has issued an unfair labor practice complaint, the Board has discretionary authority to dismiss the complaint if it finds that, because the business involved has only a remote and insubstantial effect on commerce, the assertion of jurisdiction would not effectuate the policies of

[3]Before decision, the General Counsel had set forth his position, that the Board lacked power to dismiss for policy reasons, in a supplemental brief and in oral argument before the Board. Petitioner, on the other hand, at no point contested the Board's power. It did not request oral argument; did not, although granted oportunity, file a brief (see Board's telegram dated October 26, 1948, included in the full transcript of record filed with this Court); nor did it request a reconsideration of the Board's decision.

the Act. This issue is identical with the principal question involved in the *Haleston* case, now pending argument before this Court as *Haleston Drug Stores, Inc.* v. *N. L. R. B.*, No. 12412 (see n. 1, p. 2, *supra*). Since the Board's brief in the *Haleston* case fully treats this question, we respectfully refer the Court thereto (pp. 9-43)[4]. The Board's brief in the case at bar, accordingly, will be confined to those of petitioner's arguments which, although treated in the Board's *Haleston* brief, we believe might be answered more fully at this time.

POINT I.

As an incident of separating prosecutory and adjudicatory functions, Congress did not intend that the issuance of a complaint by the General Counsel would preclude the Board from ultimately deciding what best effectuates the policies of the Act

Before issuing the complaint involved here, the General Counsel, through his agent the Regional Director, presumably decided, as petitioner states (Br., p. 5), that: (1) there was probable cause to believe that unfair labor practices were committed; (2) there was probable cause to believe that the Board had jurisdiction to correct such misconduct; and (3) the nature of these unfair labor practices and their effect upon commerce was sufficient to warrant initiation of formal proceedings. Petitioner concedes (Br., p. 6) that, after prosecution of the case has been completed and it comes to the Board for decision, the Board is free to overturn the General Counsel's judgment on items (1) and (2); it urges, however, that the Board may not do so on item (3). The conclusion as

[4]The Board's brief in the *Haleston* case (hereafter referred to as "*Haleston* brief") is now on file with the Clerk of the Court, and the Board will serve petitioner herein with copies of that brief at the same time the instant brief is served.

to item (3) rests on the assumption that, unless "the decision of the General Counsel that the case is worthy of prosecution [is] accepted as conclusive" (Br., p. 9), the "final authority", which Section 3 (d) confers upon the General Counsel in respect of the investigation of charges and issuance of complaints, is negated.

We have shown in the *Haleston* brief (pp. 25-26) that, from the standpoint of both substance and procedure, there is no difference between a Board decision which reverses the General Counsel on items (1) and (2), and one which, as here, reverses the General Counsel's policy judgment (item (3)). Accordingly, since petitioner concedes that the former type of Board decision does not invade the General Counsel's final authority under Section 3 (d), it should follow that neither does the latter type of Board decision.

Petitioner's answer (Br., pp. 17-30) is that Congress intended, as an incident of separating prosecutory and adjudicatory functions, to vest the General Counsel with exclusive discretion to determine what cases the Board must decide on the merits, and to confine the Board to the sterile function of determining "whether there is jurisdiction in fact and whether or not unfair labor practices were committed" (Br., p. 29). We submit that petitioner has misconceived the purpose which Congress sought to achieve by separating functions within the agency, and the respective roles which it assigned to the General Counsel and the Board.

A. The historical setting from which Section 3 (d) emerged

The condition which Congress, by section 3 (d), sought to eradicate is not novel, nor even peculiar to the National Labor Relations Board. For the past twenty years, there has been a growing concern over the blending within a single administrative agency of both the power to initiate

prosecution and the power to decide whether the conduct in issue actually warrants imposition of a sanction[5]. Such blending of powers has been condemned on several grounds. Dean Landis has phrased the objection as follows:[6]

> A first and fundamental principle of natural justice is that no man shall be judge in his own cause; a tribunal that has enforcing functions has by that fact an interest in the outcome of the litigation to which it is a party and hence should not take part in the process of decision. That psychological interest .... may be more compelling than even a pecuniary interest, inasmuch as the tribunal will feel under some pressure to defend a policy which it may have initiated, or at least to establish the fact that its earlier judgment was justified.

The President's Committee on Administrative Management added:[7]

> [Blending of prosecutory and adjudicatory functions] not only undermines judicial fairness; it weakens public confidence in that fairness. Com-

[5]See Landis, *The Administrative Process* (Yale, 1938), pp. 91-92; *Report of the Committee on Ministers' Powers* (1932, Cmd 4060), pp. 76-79; 61 A. B. A. Rep. 735 (1936); *Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management* (Gov't Print. Off., 1937), pp. 39-42; *Final Report of the Attorney General's Committee on Administrative Procedure* (Gov't Print. Off., 1941), pp. 55-60, 203-209, 249; Benjamin, *Administrative Adjudication in the State of New York* (1942), pp. 47-66.

[6]Landis, *op. cit,* p. 92.

[7]*Report, op. cit,* p. 40. See also, Gellhorn, *Federal Administrative Proceedings* (Johns Hopkins, 1941), p. 18, quoted in *Haleston* brief, p. 30.

> mission decisions lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself.

To meet these objections, numerous proposals were advanced for "separating functions" — ranging from devices for segration within the existing agency to the creation of two separate bodies, one to handle prosecution and the other, adjudication.[8] Congress, after many years of sifting through these various proposals, enacted the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1001, *et seq.*). This Act, which essentially reflects the recommendations of the majority members of the Attorney General's Committee on Administrative Procedure,[9] seeks to solve the problem by a form of internal segregation — i.e, insulating the agency's hearing officers from agency employees who engage in prosecutory functions, and guaranteeing salary and tenure independence to these officers.[10]

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[8]See Cushman, *The Independent Regulatory Commissions* (Oxford, 1941), pp. 708-725; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36-45; Davis, *Separation of Functions*, 61 Harv. L. Rev. 389, 395 ff.

[9]*Final Report*, *op. cit*, pp. 46-60.

[10]Thus Section 5 (c) of that Act provides, in part:

> " . . . no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency . . ."

Section 11 contains the provisions with respect to salary and tenure of hearing officers. See also, *Administrative Procedure Act, Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess., pp. 24-25, 361-362. Cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

The foregoing campaign to effect a separation of functions in the administrative process usually included among its arguments the unfair labor practice procedure of the Wagner Act. This procedure, it was pointed out, worked in practice as follows: When an unfair labor practice charge was filed in a regional office it was assigned to a field examiner for investigation; a report on his investigation was forwarded to the Board in Washington, where it was referred to a committte designated by the Board; this committee digested the field examiner's report and presented the matter orally to the Board, which then decided whether a complaint should issue. By thus playing a part in the issuance of the complaint, critics argued that the Board could not avoid prejudging the case, for it had before it affidavits of witnesses compiled by the field examiner comprising the evidence which would be presented at the trial; a summary of the defendant employer's defense to the charges; and analyses of the law prepared by both the regional and Washington legal staffs.[11] Accordingly, these critics concluded that the Board's ultimate adjudication was "unfair and biased" — a mere rationalization of a predetermined result.[12]

Just as broad-scale proposals had been advanced to mitigate blending of functions in the administrative pro-

[11]See *Hearings before Senate Committee on Education and Labor on Proposed Amendments to NLRA*, 76th Cong, 1st Sess., pp. 42-43, 49-50; H. Rep. No. 1902, Part 1, 76th Cong., 3d Sess., pp. 89-90; Johnson, *The National Labor Relations Act, Should It Be Amended* (H. W. Wilson Co., 1940), pp. 63-67, 283-284; Gellhorn & Linfield, *Politics and Labor Relations*, 39 Col. L. Rev. 339, 385 (1939); Davey, *Separation of Functions and the NLRB*, 7 U. of Chi. L. Rev. 328, 329, n. 6 (1940). See also, S. Rep. No. 1516, 81st Cong., 2d Sess., pp. 3-4.

[12]H. Rep. No. 3109, 76th Cong., 3d Sess., p. 149. See also, H. Rep. No. 1852, 81st Cong., 2d Sess., p. 21.

cess generally, specific plans were devised for coping with the Wagner Act's manifestation of this alleged vice.[13] For example, as petitioner notes (Br., pp. 26-27), the Smith Committee of the House of Representatives, in 1940, recommended that the prosecutory functions of the Board be transferred to an Administrator, unconnected with the Board and appointed by the President, subject to confirmation by the Senate.[14]

With the enactment of the Administrative Procedure Act in 1946, the Board, upon analysis of the separation of functions provisions of Section 5 (c) of that Act (n. 10, p. 9, *supra*), concluded:[15]

> ..... we think that the Board's customary structure meets the requirements. The Board's Trial Examining division is a separate autonomous unit of the Board, under the direction and supervision of a Chief Trial Examiner who is responsible directly to the Board and to no one else. The prosecution and investigation of cases, on the other hand, are handled by the Regional Offices almost entirely on an autonomous and independent basis. Where advice as to prosecutions is desired, the Board has established a Committee, consisting of the Director of the Field Division and the Associate General Counsel in charge of field legal operations, to consider and give such advice. None of these persons participates or assists the Board in the decision of cases. Nor do they have any supervision

[13]See Cushman, *The Independent Regulatory Commissions* (Oxford, 1941), pp. 714-715.

[14]H. Rep. No. 1902, Part 1, 76th Cong., 3d Sess., pp. 89-90.

[15]Findling, *NLRB Procedures: Effects of the Administrative Procedure Act*, 33 A. B. A. J. 14, 17 (January, 1947).

> or control over personel who do. The Board is assisted in the decision of cases by the Review Section, which is headed by an Assistant General Counsel, and whose staff has no other functions.

The 80th Congress, which was considering amendments to alleviate other Wagner Act problems, decided, however, that, insofar as the Board was concerned, the Administrative Procedure Act had not adequately eliminated the danger of Board prejudgment of unfair labor practice cases.[16]

Thus H. R. 3020, as passed by the House of Representatives, undertook to deal with this matter in a manner similar to that proposed by the Smith Committee — i.e., by taking away from the Board power over the investigation of charges and issuance of complaints, and vesting it in an Administrator, wholly outside of the agency.[17] The Administrator was also given the function of seeking enforcement of the Board's orders in the courts, and the function of handling preliminary phases of representation cases. In the Conference Committee, however, the provision for a separate Administrator was rejected, and in its place emerged the present Section 3 (d).[18] Unlike the House version, which in effect created separate agencies, Section 3 (d) sought to achieve separation of functions

[16]See *Hearings before the House Committee on Education and Labor on Amendments to the NLRA*, 80th Cong., 1st Sess., pp. 230, 2344, 2530-2531, 2722, 2729. See also, H. Rep. No. 1852, 81st Cong., 2d Sess., pp. 28-29; S. Rep. No. 1516, 81st Cong., 2d Sess., p. 7.

[17]H. R. 3020, 80th Cong., 1st Sess., Sec. 4., set forth in *Legislative History of the Labor Management Relations Act 1947* (Gov't Print. Off., 1948), Vol. I, pp. 173-175. See also, H. Rep. No. 245, 80th Cong., 1st Sess., pp. 6, 26, set forth *Id.*, at pp. 297, 317.

[18]See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 36-37, set forth in *Legislative History, op. cit*, pp. 540-541. Neither S.

"within the framework of the existing agency".[19] A "General Counsel *of the Board* who shall be appointed by the President" was vested with "final authority, *on behalf of the Board*, in respect of the investigation of charges and issuance of complaints under Section 10" (Italics added). *Act as amended*, Section 3(d). The function of seeking enforcement of the Board's orders in the courts, and the handling of representation cases remained, as before, with the Board.[20]

B. The effect of Section 3 (d) in the light of the problem at which it was directed, i. e., Board prejudgment of unfair labor practice cases.

In the light of this background, it is apparent that Section 3 (d) was directed against the danger of Board *prejudgment* of a case which it would ultimately decide, by reason of having, in some degree, participated in the determination to issue a complaint therein. Cf. S. Rep. No. 1516, 81st Cong., 2d Sess., pp. 3-7. The provision sought to accomplish such objective by reassigning the function of determining, based on preliminary investigation of the charge, the propriety of issuing a complaint. That function was transferred, from an "anonymous committee of subordinate employees" controlled by the Board, to the General Counsel. To insure that the General Counsel, in the discharge of this function, would be divorced from the Board, it was provided that he be appointed by the President and that his determination respecting the issuance or non-issuance of a complaint be

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1126 as reported by the Senate Labor Committee, nor H. R. 3020 as passed by the Senate, contained any provision for isolating the Board from the investigation of charges and the issuance of complaints. *Legislative History*, pp. 99-157, 226-291, 414-416.

[19]93 Cong. Rec. 6599 (June 5, 1947).

[20]See *Haleston* brief, pp. 21-23; 38-41.

"final".[21]

Under the Wagner Act, the function exercised by the Board-established committee, "consisting of the Director of the Field Division and the Associate General Counsel in charge of field legal operations" (*supra*, p. 11), was confined to the area of *probable cause*. The Committee determined, based upon the results of the preliminary investigation of the charge, whether there was probable cause to believe that unfair labor practices affecting commerce had occurred (items (1) and (2), *supra*, p. 6). The Committee also determined whether issuance of a complaint would effectuate the policies of the Act (item (3), *supra*, p. 6). But this policy determination, too, was not an adjudication of the question; it merely constituted the prosecutor's finding that there was *probable cause* to believe that the institution of proceedings would further the objectives of the Act. The adjudication of this question, like that of the question whether unfair labor practices had been committed, was made by the Board, after a formal record had been compiled. See *Brown & Root, Inc.*, 51 N. L. R. B. 820.

Accordingly, by transferring the Committee's function to the General Counsel, Section 3 (d), although empowering the General Counsel to make a policy determination as to whether the case is "worthy of prosecution", does not authorize him to *adjudicate* this question to the exclusion of the Board, but only to make the same type of prosecutor's finding which petitioner concedes (*supra*, pp. 6-7) he is limited to on the other questions in the

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[21]See Senator Taft's statement, quoted in *Haleston* brief, pp. 26-27. Cf. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 37: "By this provision [Section 3 (d)] responsibility for what takes place in the *Board's regional offices* is centralized in one individual who is ultimately responsible to the President and Congress" (emphasis added).

case — i.e., *a finding of probable cause.* The General Counsel's findings of probable cause — both on the question of policy and on the question of whether unfair labor practices have been committed — are "final" and unreviewable by the Board (see pp. 19-25, *infra*). But, when the prosecution phase of the case has been completed — a point which marks the end of the General Counsel's authority — and the case is before the Board for decision, the *preliminary* findings on which institution of the proceeding was predicated do not foreclose the Board from adjudicating the *ultimate* validity of each such finding, including that on policy.[22]

This analysis of the effect of Section 3 (d) is conclusively affirmed by the statements of Senator Taft, made both before and after the Wagner Act was amended.[23] For example, he emphasized that the General Counsel's decision "will be subject to the judicial decision of the Board". Senator Taft, moreover, left no doubt that he meant this observation to be applicable to the General Counsel's decision on policy questions as well as on the merits, for he added, with reference to the issue presented here, that: "Gradually these differences between the Board and the General Counsel [on the policy of asserting jurisdiction over local enterprises] will be resolved by the Board, and of course the Board has the final word".[24]

[22]Indeed, if these preliminary findings did have such force, they would in effect prejudge the ultimate decision, the very evil which Congress, by Section 3 (d), sought to avoid. Cf. *Haleston* brief, pp. 31-32.

[23]Quoted in *Haleston* brief, pp. 27-29.

[24]The portions of legislative history cited by petitioner (Br., pp. 18-26) are entirely consistent with our view of the purpose and effect of Section 3 (d). They merely disclose, as we have recognized, that Congress intended to vest the General Counsel, free from any direction or control by the Board, with the power

In addition, the budgetary structure of the agency necessarily requires that the Board, rather than the General Counsel, have the power ultimately to decide whether, as a matter of policy, jurisdiction should be asserted over a particular enterprise. Under the Act, final responsibility

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to determine all questions incidental to the issuance of complaints. There is no indication of any intention that the General Counsel, by exercising his unreviewable discretion to prosecute, would limit the Board's decisional process. See also, n. 35, p. 24, *infra*.

The fact that, as passed by the House H. R. 3020, which provided for an independent Administrator, "contained no statement with the respect to the finality of the Administrator's action while the Conference Bill gave the General Counsel 'final authority'" (Br., pp. 27-28), weakens, rather than strengthens, petitioner's position. Since, in petitioner's view, the fact that Section 3 (d) gives the General Counsel "final authority" in respect of complaints precludes the Board from dismissing for policy reasons, the absence of this phrase in H. R. 3020 means that, under the House Bill, the Board would have retained its Wagner Act power to dismiss complaints for policy reasons. Since the Conference Bill, which was finally enacted, was a compromise between H. R. 3020 as passed by the House and Senate action which made no provision for separation of functions (see n. 18, p. 12, *supra*), it is hardly likely that it went further than did H. R. 3020 in limiting the Board's decisional process.

Nor does the Senate's rejection of Reorganization Plan No. 12, which would have abolished the independent office of General Counsel, establish, as petitioner contends (Br. pp. 51-53), that Congress intended the General Counsel's prosecution policy judgment to preclude the Board from itself deciding whether an assertion of jurisdiction would effectuate the policies of the Act. Reorganization Plan No. 12 was opposed, not because it would have empowered the Board to decline to assert jurisdiction for policy reasons, but because it would allegedly have restored the Board to the position where its adjudicatory decision might be tainted by its preliminary findings in respect of issuance of the complaint. See H. Rep. No. 1852, 81st Cong., 2d Sess., pp. 21-22, 27-29; S. Rep. No. 1516, 81st Cong., 2d Sess., pp. 3-7; 96 Cong. Rec. 6962 (May 11, 1950). Cf. the statements of Senator Taft, one of the leading opponents of Plan 12, set forth in the text above, p. 15.

for estimating the agency's fiscal needs, and for determining how the money appropriated to the agency by Congress is to be utilized, is vested in the Board, not in the General Counsel. Thus Section 3 (c) of the Act provides that:

> *The Board* shall at the close of each fiscal year make a report in writing to Congress and the President stating in detail ..... the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and *an account of all moneys it has disbursed.* (Italics added).

Section 4 (a) provides that:

> *The Board* shall appoint an executive secretary, and such attorneys, examiners, and regional directors and such other employees as it may from time to time find necessary (emphasis added).

And Section 4 (b) provides that:

> All of the expenses *of the Board,* including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board *under its orders,* shall be allowed and paid on the presentation of itemized vouchers therefor *approved by the Board* or by any individual it designates for that purpose (emphasis added).[25]

The Act confers no comparable duties or authority upon

[25]The term "Board", as used in these provisions, means the five members of the National Labor Relations Board. *Act,* Sections 2 (10), 3 (a). See *Evans* v. *ITU,* 76 F. Supp. 881, 887-888 (S. D. Ind.); *N. L. R. B.* v. *ITU,* 76 F. Supp. 895, 898-899 (S. D. N. Y.).

the "General Counsel of the Board."[26]

Furthermore, Congress, in appropriating money for the administration of the Act, does not appropriate one sum for the office of General Counsel and another for the Board, but a total amount for the "National Labor Relations Board."[27] This total amount is based upon a fiscal year budget estimate submitted to the Bureau of the Budget by the Chairman of the Board on behalf of the entire agency.[28] Similarly, communications from the Bureau of Budget, with respect to such matters as budget policy and personnel ceilings for the agency, are addressed to the Chairman of the Board.[29]

As we have shown in the *Haleston* brief (pp. 43-49), the decision as to whether assertion of jurisdiction over a particular enterprise would effectuate the policies of the Act involves a judgment as to what constitutes the best

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[26]Cf. Section 4 of H. R. 3020, as passed by the House. *Legislative History of the Labor Management Relations Act 1947* (Gov't Print. Off., 1948), Vol. I, pp. 173-175. See also, S. 3339, 81st Cong. 2d Sess, Secs. 4 (a), (b) and (c), set forth in *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2d Sess., pp. 38-39.

[27]See *Third Deficiency Appropriation Act, 1949*, Public Law 343, set forth in U. S. Code Congressional Service, Vol. I, pp. 755-760.

[28]A copy of the Chairman's covering letter for the 1951 budget estimate is reproduced in the Appendix, *infra*, pp. 39-42.

[29]That the Board, rather than the General Counsel, controls the budget, is also shown by the fact that Reorganization Plan No. 12, which, *inter alia*, would have transferred the administrative functions of the agency to the Chairman of the Board, contained the following proviso: "There are hereby *reserved to the Board its functions* with respect to budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes" (emphasis added). *Reorganization Plan No. 12*, Sec. 1 (b) (4), set forth in S. Rep. No. 1516, 81st Cong., 2d Sess., p. 16.

allocation of funds and personnel. See also, H. Rep. No. 1852, 81st Cong., 2d Sess., p. 10. Since the Board, and not the General Counsel, controls the factors which enter into this policy decision, the Board, unless its budgetary control were to be rendered illusory, must have the last word on whether the exercise of jurisdiction is warranted. In short if the issuance of a complaint by the General Counsel did more than determine this question preliminarily — i.e., precluded the Board from making an independent evaluation of the relevant factors — the "final authority" of the Board, rather than of the General Counsel, would be *pro tanto* nullified. Conversely, Board dismissal of a complaint for the policy reason of remote effect on commerce no more intrudes upon the General Counsel's selection of cases for prosecution than if the Board were to limit outright the amount of funds expended by the General Counsel — which it could clearly do in the exercise of its absolute control over the allocation of the agency's appropriation. The General Counsel's discretion is thus not unlimited. Moreover, as Senator Taft pointed out, should the Board "make some declaration of policy", the General Counsel must follow that policy (see *Haleston* brief, p. 29; cf. *Id.*, p. 47).

To sum up: The purpose of Section 3 (d) was to avoid the danger of Board *prejudgment* of unfair labor practice cases. It achieves this objective by vesting the General Counsel with the sole power to determine all questions of *probable cause* incidental to the issuance of a complaint, thereby insulating the Board from the prosecutory stage of the case. Section 3 (d), however, does not affect the decisional stage of the case. After a complaint has issued and a hearing has been held, any action the Board may thereafter take, either as a matter of policy or on the merits, is an exercise of adjudicatory power, to

which the *preliminary findings* instituting the proceeding are ultimately subjected.

C. Restriction of the General Counsel's authority to probable cause findings does not strip him of power to make "final" determinations within the meaning of Section 3 (d)

Petitioner contends (Br., pp. 12-16) that the phrase "final authority," contained in Section 3 (d), means without review by the Board. It argues that since, in determining whether to issue a complaint, the General Counsel must conclude that, as a matter of policy, the case is worthy of prosecution, a Board decision dismissing the complaint on policy grounds is in effect a review of the General Counsel's action, destroying its finality in contravention of Section 3 (d) (Br., pp. 16, 28-30).

Petitioner concedes, however, that a Board decision which is contrary to the General Counsel's analysis of the merits does not constitute a review of his action and hence is not inconsistent with his "final" authority (*supra*, pp. 6-7). We submit that there is no valid basis for this distinction.

The Board's dismissal of a complaint issued and prosecuted by the General Counsel — whether such dismissal be on the merits or on policy grounds — does not review the findings which Section 3 (d) authorizes him alone to make. As shown (*supra*, pp. 13-19), Section 3(d) merely empowers the General Counsel to make findings of probable cause — the nature of his findings on policy issues being the same as those on the merits. This area the Board does not enter as a reviewing agent.

When the case reaches the Board for decision, the Board is not concerned with the question of whether there is probable cause to believe that the law has been violated — the issue determined by the General Counsel — but with the entirely different question of whether such violation has *actually* occurred. Similarly the Board is not con-

cerned with the question of whether the case is *worthy of prosecution;* i.e., the policy judgment of the prosecutor, based upon his preliminary investigation of the charge and his estimate as to the importance of the case in relation to the over-all demand on the agency's limited budget and personnel. Rather, the Board decides the further question of whether the case is *worthy of adjudication* — a quasi-judicial decision based upon the entire record and complete knowledge as to the agency's available resources.

The validity of this analysis is borne out by reference to the relation between the Board and a District Court which has issued an injunction under Section 10 (1) of the Act. Under this provision the General Counsel or his agent is directed in the case of certain types of unfair labor practice charges to apply to the District Court for temporary injunctive relief should preliminary investigation disclose "reasonable cause to believe such charge is true and that a complaint should issue."[30] The District Court, in determining whether to issue an injunction, *reviews* the General Counsel's findings of probable cause — both on the merits and on policy — but makes no attempt to decide whether they are ultimately valid. Resolution of this further question, which "must rest upon a full hearing and a measure of proof and inquiry extending beyond the standard of probability" (*Evans* v. *ITU*, 76 F. Supp. 881, 885 (S. D. Ind.)), is for the Board when the case subsequently reaches it for adjudication.[31] As a corollary,

[30]By delegation from the Board, the General Counsel may also apply for temporary injunctive relief after a complaint has been issued, as provided in Section 10 (j). See 13 F. R. 654-655; 15 F. R. 1088-1090.

[31]See *LeBaron* v. *Los Angeles Bldg. & Construction Trades Council*, 84 F. Supp. 629, 635-636 (S. D. Cal.); *Brown* v. *Roofers & Waterproofers Union*, 86 F. Supp. 50, 52-54 (N. D. Cal.); *LeBaron* v. *Kern County Farm Labor Union*, 80 F. Supp. 151, 154,

the District Court's affirmance of the General Counsel's findings of probable cause, like the General Counsel's findings where no 10 (1) injunction has been obtained, is in no way relevant or material to the Board's adjudicatory function of arriving at an ultimate decision. The Board is not concerned with matters of probable cause — the subject dealt with by the General Counsel and the District Court — but with the further and unrelated matters of whether a violation of law has *actually* occurred and whether adjudication of the controversy would *in fact* effectuate the purposes of the statute.[32]

It should also be emphasized that because the Board's adjudication results in a dismissal of the General Counsel's process, it does not follow, as petitioner itself concedes with respect to disposition on the merits, that the Board has reviewed the General Counsel's action in instituting the proceeding. Just as the return of an indictment by a grand jury is "conclusive on the issue of probable cause " (*Ewing* v. *Mytinger & Caselberry*, 70 S. Ct. 870, 873), even though the trial court may subsequently determine that the accused is not guilty, the General Counsel, in issuing a complaint, conclusively determines all issues of probable cause incidental thereto. The Board's subsequent decision dismissing the complaint — either on the merits or on policy grounds — does not constitute a review of the General Counsel's action any

153 (S. D. Cal.); *Douds* v. *Local 294*, 75 F. Supp. 414, 418 (N. D. N. Y.). Cf. *Brown* v. *Retail Shoe & Textile Salesmen's Union*, 26 LRRM 2225 (N. D. Cal.), March 6, 1950.

[32]Compare *Shore* v. *Bldg. & Construction Trades Council*, 173 F. 2d 678 (C. A. 3) with *Bldg. & Construction Trades Council (Petredis & Fryer)*, 85 N. L. R. B. 241. Compare *Bott* v. *Glaziers' Union*, 23 LRRM 2181 (N. D. Ill., November 19, 1948) with *Glaziers' Union (Joliet Contractors Ass'n)*, 90 N. L. R. B. No. 93, 26 LRRM 1245, June 26, 1950. See also, *Denver Bldg. & Construction Trades Council*, 82 N. L. R. B. 93.

more than does the trial court's determination that the accused was innocent constitute a review of the grand jury's finding of probable guilt.

In sum therefore, Board dismissal of a complaint for policy reasons, like a dismissal on the merits, does not strip the General Counsel of the power to make "final" determinations within the meaning of Section 3 (d). The General Counsel, in determining that a complaint should issue, makes findings of probable cause. These findings are neither reviewed, nor in any other manner considered, by the Board when it subsequently performs its adjudicatory function. The Board is concerned, not with probability but with actuality.[33]

Moreover, as Mr. Justice (then Attorney General) Jackson has observed:[34] "The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous ..... he can choose his defendants ....." So the General Counsel, by virtue of Section 3 (d), has the absolute discretion to determine those cases in which formal pro-

[33]The *Bryan* and related cases cited by petitioner (Br., pp. 12-16) present the situation where the head of the department sought to redetermine the *identical question* decided by one of its bureaus. They are therefore inapplicable to the situation here, where the Board is concerned with questions *entirely different* from those determined by the General Counsel.

Petitioner's reliance on the *Lincourt* and *Parsons* cases (Br., pp. 11-12) is likewise misplaced. The question in these cases was whether the Board could review the General Counsel's *refusal to issue* a complaint, and not, as here, whether the *issuance of a complaint* by the General Counsel limits the Board's decisional process. The Board has always recognized that it has no authority to review the General Counsel's refusal to issue a complaint—see discussion in text, pp. 23-25, *infra*.

[34]Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18-19 (1940). See also Landis, *The Administrative Process* (Yale, 1938), pp. 110-111; Davis, *Administrative Powers*, 63 Harv. L. Rev. 193, 218-219.

ceedings will be instituted. The "Board cannot itself issue a complaint; it cannot compel the General Counsel either to issue or refrain from issuing one; it cannot review his action in refusing to issue one" (R. 55).[35] Indeed, this is so because the General Counsel's determination of probable cause is final and conclusive and the Board's quasi-judicial functions do not come into play unless the General Counsel has made a preliminary finding of probable cause.

Not only does the General Counsel alone control the choice (but not the disposition) of unfair labor practice cases which come before the Board, but his final and unreviewable authority to determine whether an unfair labor practice proceeding should be instituted can limit even the functions reserved to the Board in representation matters. As pointed out by Chairman Herzog:[36]

> the statute empowers the Board alone to certify the bargaining representative of employees in an appropriate unit, upon petition of the employees or their employer. The Board's certificate, issued after hearing and secret-ballot election, is not a binding order to the employer to bargain collectively with the certified representative. The em-

[35]It was in this context that opponents of Section 3 (d) spoke of the General Counsel's power "to control the policy for the enforcement of the Act", and "to determine when a complaint shall be acted upon by the Board" (Br., pp. 24-26). That is, they meant that there was no control over the cases which the General Counsel chose, in his unfettered discretion, to *leave out;* not that, once a case was brought, the Board was barred from dismissing for policy reasons. See *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248,* 81st Cong., 1st Sess., p. 119.

[36]*Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248,* 81st Cong., 2d Sess., p. 122.

> ployer may challenge the Board's certificate by refusing to bargain. But the Board is powerless to enforce its certificate unless and until an unfair labor practice proceeding is instituted and prosecuted by the General Counsel. If he should refuse for any reason to initiate such proceeding, the certificate would become worthless. And, of course, the policy of Congress to promote industrial peace by fostering collective bargaining would to that extent be obstructed . . .

Likewise, Section 9 (c) (3) of the Act provides that economic strikers who have been replaced (as distinguished from workers whose strike was caused or prolonged by employer unfair labor practices) shall not be eligible to vote in Board representation elections. Unless the General Counsel issues a complaint against the employer (and it is sustained), the Board is precluded in a representation proceeding from making a finding that the strike was caused or prolonged by an unfair labor practice; it must presume and hold that the strikers have lost their eligibility to vote.[37] "Thus the General Counsel is able to determine the outcome of an election conducted during a strike." S. Rep. No. 99, 81st Cong., 1st Sess., p. 40.

POINT II.

Section 10 of the Act confers upon the Board discretionary authority to dismiss complaints for policy reasons, including remote effect on commerce

Petitioner further contends (Br., pp. 31-49) that, apart from the fact that discretionary authority in the Board to decline jurisdiction for policy reasons is incompatible with Section 3 (d), there is nothing in either the Act or the inherent power of an administrative agency which

[37]See cases cited *Haleston brief*, p. 25, n. 31.

confers such discretion upon the Board. We shall demonstrate that this contention is likewise without merit.

A. Section 10 (c) does not preclude the Board from dismissing complaints for policy reasons

Petitioner emphasizes (Br., pp. 32-34) that Section 10 (c) of the Act affords the Board but two alternatives — "if it believes that unfair labor practices are committed, it 'shall' issue a cease and desist order; if it is of the opinion that unfair labor practices were not committed, it 'shall' dismiss the complaint." Section 10 (c), petitioner urges, thus limits the Board's power to dismiss a complaint to the situation where it finds that the conduct alleged in the complaint does not constitute an unfair labor practice affecting commerce.[38]

Borrowing Mr. Justice Frankfurter's language (*Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 191), "this is a bit of verbal logic from which the meaning of things has evaporated."

1. The words "shall" in Section 10 (c) do not have the mandatory and limiting effect ascribed to them by petitioner. The Senate Committee, in commenting upon the Board's complaint procedure under the Wagner Act, stated that:[39]

> After [unfair labor practice] hearings, the Board . . . *may* issue orders requiring the person complained of to cease and desist and to take such affirmative action . . ., as may be necessary to ef-

[38]Petitioner adds (Br., p. 33) that, by its terms, Section 10 (c) confers discretion upon the Board *only* in respect to fashioning an *affirmative* remedy.

[39]S. Rep. No. 573, 74th Cong., 1st Sess., p. 15. Section 10 (c) of the amended Act, in all respects material here, is identical to Section 10 (c) of the Wagner Act.

> fectuate the polices of the bill ..... (Italics added).

Similarly, the House Committee expressed the view that the issuance of an order under Section 10 (c) was discretionary with the Board:[40]

> The form of *injunctive and affirmative order* is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal.

The legislative history of Section 10 (c) therefore recognizes that, despite the issuance of a complaint and a finding that unfair labor practices affecting commerce have occurred, the Board has discretionary authority to withhold a cease and desist order, as well as an affirmative remedy, if, in its judgment, such course would best effectuate the policies of the Act.

The existence of such discretionary authority is also shown by the Board's holding in *Marshall and Bruce Co.*, 75 NLRB 90, 95-97, which was approved by the Court of Appeals for the Second Circuit in *NLRB* v. *Brozen*, 166 F. 2d 812, 813-814. There, the Board, because of the policy evidenced by Sections 9 (f), (g), and (h) of the amended Act, conditioned its order, containing the usual cease and desist and affirmative remedies for a finding of unlawful refusal to bargain, upon the union's compliance with those provisions within 30 days. This result was not required as a matter of law, for the unfair labor practice had been committed, and the Board proceeding instituted, prior to the enactment of Sections 9 (f), (g), (h).[41] The

[40]H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24.

[41]See *N.L.R.B.* v. *Clark*, 176 F. 2d 341, 343 (C.A. 3); *N.L.R.B.* v. *Fulton Bag & Cotton Mills*, 180 F. 2d 68, 71-72 (C.A. 10).

imposition of a condition on issuance of the cease and desist portion of the order can thus be explained only on the theory that Section 10 (c) vests the Board with discretionary authority to withhold negative, as well as affirmative relief, if it finds that the policies of the Act so require.[42]

Equally relevant is this Court's recent decision in *N. L. R. B.* v. *Flotill Products, Inc.*, 180 F. 2d 441. There, the Board, having found that Flotill had committed unfair labor practices by granting exclusive recognition and a closed shop to the AFL at a time when its representative status was being challenged by the CIO, ordered Flotill "to cease and desist from these unfair labor practices, to cease giving effect to the closed-shop contract, [and] to withhold exclusive recognition from the AFL unless and until" it had been certified by the Board (180 F. 2d, at 443). This Court, without determining whether Flotill's conduct was violative of the Act,[43] concluded that, in view of subsequent events, the Board's order would tend to thwart rather than effectuate the purposes of the Act. The Court therefore set aside the Board's order in its entirety — the cease and desist portions as well as the affirmative portions. If Section 10 (c), as petitioner contends, had made the issuance of a cease and desist order mandatory upon finding that unfair labor practices were committed, this would have limited the Court in the exercise of its function under Section 10 (e) no less than it limited the Board in the first instance. Accordingly, the Court could not have declined to enforce the cease and desist portions of the Flotill order unless it had first reversed the Board's unfair labor practice finding.

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[42]See also, *Solvay Process Co.* v. *N. L. R. B.*, 117 F. 2d 83, 86 (C. A. 5), cert. den., 313 U. S. 596: "By Section 10 (c) of the Act . . . the Board may exercise some discretion in determining whether affirmative or negative relief, or both, should be granted."

[43]Cf. *N. L. R. B.* v. *Hume Co.*, 180 F. 2d 445, 447 (C. A. 9).

2. There can thus be no question that, had the Board determined here that unfair labor practices affecting commerce existed, it would nevertheless have been empowered by Section 10 (c) to withhold both negative and affirmative relief for policy reasons, and consequently to dismiss the complaint. Moreover, even had an order been issued, the Board, under the discretionary authority conferred by Section 10 (e), could in effect have achieved the same result by declining to seek enforcement of the order.[44] Under these circumstances, it is reasonable to assume that, should the policy considerations which would bar relief become apparent, as here, at the threshold of the case, the Board would possess the power to dismiss the complaint on policy grounds, without first having to go through the time and expense of a futile decision on the merits.

The Act fulfills this reasonable expectation. As the Supreme Court in the *Indiana and Michigan* case (318 U. S. 9, 19) and the lower courts in other cases (*Haleston* brief, pp. 12-14) have held, the Board, under the Wagner Act, possessed discretionary authority to dismiss a complaint for policy reasons, *without* determining the existence of unfair labor practices. This power stemmed, not from the Board's authority to initiate prosecution (Section 10 (b)), but from the fact that Congress imposed on the Board an overriding obligation to determine in its quasi-judicial capacity, before exercising any of the powers enumerated in Section 10, that "the unfair labor practice complained of interferes so substantially with the public rights created in Section 7 as to require its restraint in the public interest." *N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), cert. den., 314 U. S. 693.[45] This obligation was manifested by

[44]See *Haleston* brief (pp. 10-11, 22, 41).

[45]See also, *N. L. R. B.* v. *Walt Disney Products*, 146 F. 2d 44, 48 (C. A. 9), cert. den., 324 U. S. 877.

the permissive language of Section 10 (a) of the Wagner Act, which read: "The Board is *empowered*, as hereinafter provided, to prevent any person from engaging in any unfair labor practice" (emphasis added).

The phrase "as hereinafter provided," together with the procedures enumerated in the succeeding sub-sections of Section 10, were not, as petitioner contends (Br., pp. 32-34), incompatible with the existence of such discretionary power. The phrase and the procedures meant that, should the Board conclude that the public interest required it to prevent the unfair labor practice in issue, it must do so by means of the procedure spelled out in the statute. They did not, however, require that the word "empowered" in Section 10 (a) be read as "directed," so that the Board was compelled in every case to follow such procedure blindly to completion, without regard to the effect thereof on the policies of the statute.

In other words, Section 10 (c) of the Wagner Act merely described the manner in which the Board would exercise its quasi-judicial function of determining whether unfair labor practices had been committed and how they should be cured — once it reached the merits. But Section 10 (c) did not compel the Board to make such determination if it appeared, from the record before it, that there were valid policy reasons for declining to pass on the merits. The Board's overriding obligation, as expressed in the permissive language of Section 10 (a), carried forward to the adjudicatory stage the power, under these circumstances, to dispose of the case on the policy grounds.

The amendments to the Wagner Act have altered neither the relevant language of Section 10 (a), nor the Board's obligation to give effect to the public interest (see *Haleston* brief, pp. 21-23). Accordingly, the grant of control over the issuance of complaints to the General Counsel, although precluding the Board from determining

whether the policies of the Act warrant *initiation* of the unfair labor practice procedure enumerated in Section 10, does not deprive the Board of power to give effect to its public responsibilities when the case reaches the *subsequent stage* of adjudication. At that stage, as the recent decision in the *Electrical Workers'* case indicates (*Haleston* brief, pp. 41-43), the Board still possesses discretionary authority to dismiss complaints for policy reasons without deciding whether unfair labor practices have been committed.[46]

B. The Board's power to decline jurisdiction for policy reasons is consistent with its nature as a quasi-judicial administrative agency

The Board's power to decline jurisdiction for policy reasons, contrary to petitioner's suggestion (Br., pp. 44-49), is consistent with the intention of Congress to give it only quasi-judicial functions in unfair labor practice cases. As

[46]Petitioner errs in asserting (Br., pp. 34-35) that, even in representation cases under Section 9 (c), the Board lacks discretionary authority to dismiss a petition for policy reasons. The fact that Congress, in amending Section 9 (c), changed "may investigate" to "shall investigate" is irrelevant. Granted that the Board now *must* investigate the petition, it does not follow that it lacks discretion, *after* such investigation, to dismiss the petition for policy reasons. Under the Wagner Act, the Board, in addition to remote effect on commerce, dismissed representation petitions for a number of other policy reasons — e. g., insufficient showing of interest; outstanding collective bargaining contract which stabilized bargaining relations. See *N. L. R. B., Thirteenth Annual Report* (Gov't Print. Off., 1949), pp. 27-32. Cf. *I. O. B.* v. *Los Angeles Brewing Co.*, 26 LRRM 2401, 2406 (C. A. 9), June 21, 1950. Since the legislative history of the amended Act affirmatively discloses that Congress did not intend to deprive the Board of discretion to dismiss petitions for the latter reasons (S. Rep. No. 105, 80th Cong., 1st Sess., p. 25), the presumption is that discretionary authority to dismiss petitions because of remote effect on commerce still exists. Indeed, the General Counsel concedes that, under the amended Act, the Board has discretionary authority to dismiss representation petitions on this ground (R. 62). Cf. *Haleston* brief, pp. 37-41.

we have shown in the *Haleston* brief (pp. 35-36), an essential element of the quasi-judicial function of an administrative agency is discretionary authority to effectuate the policy of the underlying statute. This is also evidenced by the holding of the Supreme Court in *FTC* v. *Klesner*, 280 U. S. 19.

The question before the Court was the propriety of the Commission's issuance of a complaint under Section 5 of the Federal Trade Commission Act. The Court, after emphasizing that Section 5 proceedings were discretionary with the Commission and to be instituted only if the public interest required, found that the unfair competition alleged in the complaint arose out of a controversy essentially private in nature. Accordingly, the Court concluded that the proceeding was not in the public interest, and that the Commission erred in failing to dismiss the complaint as soon as the record revealed the private character of the controversy. In the words of the Court (280 U. S., at 30):

> The specific facts established may show . . . that the proceeding which [the Commission] authorized is not in the public interest, within the meaning of the Act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint . . .
>
> The undisputed facts, established before the Commission, at the hearings on the complaint, showed affirmatively the private character of the controversy. It then became clear (if it was not so earlier) that the proceeding was not one in the interest of the public; and that the resolution authorizing the complaint had been improvidently entered . . .

If discretionary authority in the Federal Trade Commission to dismiss a complaint for policy reasons is thus consistent with its quasi-judicial function of determining whether unfair methods of competition have occurred, the existence of similar authority in the Board is likewise consistent with its quasi-judicial functions under the National Labor Relations Act. Especially is this so, in view of the fact that Congress specifically intended that the Board's unfair labor practice function under the National Labor Relations Act would be analogous to that of the Commission under Section 5 of the Federal Trade Commission Act. See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 269.

Moreover, even had Congress, by the amendments to the Act, converted the Board into a court,[47] this circumstance alone would not deny to it discretionary authority to dismiss proceedings for policy reasons. In sustaining, pursuant to the doctrine of *forum non conveniens*, the lower court's dismissal of a tort action over which it had diversity jurisdiction, the Supreme Court observed that:[48]

> This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances. As formulated by Mr. Justice Brandeis, the rule is:
>
> "Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts admin-

[47]Actually Congress did not do that. It retained the Board's status as an administrative agency, but left it, in unfair labor practice cases, with only quasi-judicial functions. See *Haleston* brief, pp. 33-34.

[48]*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 504.

> istering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co., Ltd.*, v. *Paterson Steamships, Ltd.*, 285 U. S. 413, 422-23.[49]

As the Court added in *Meredith* v. *Winter Haven*, 320 U. S. 228, 234-235, courts may properly decline to assert jurisdiction where there is a "recognized public policy or defined principle guiding" its non-exercise. Since the policy set forth in Section 1 of the Act provides a standard for determining which cases to entertain and which to refuse, the Board, though it were only a court, would thus have discretionary authority to decline jurisdiction.

C. Dismissal of a complaint because of remote effect on commerce effectuates the policies of the Act no less than a dismissal for other policy reasons

Conceding *arguendo* that Section 10 empowers the Board to dismiss a complaint for policy reasons, petitioner then contends (Br., pp. 35-40, 54-55) that a dismissal for the reason of remote effect on commerce is not comprehended by such authority. A dismissal on this ground, as distinguished from a dismissal for the other policy reasons cited in the Board's decision (R. 59, n. 10; see also, *Haleston* brief, pp. 12-14), does not, petitioner asserts, effectuate the policies of the Act, but is merely "a refusal to consider whether the policy of the Act has been contra-

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[49]Cf. *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105; *Slater* v. *Mexican Nat'l R. R.*, 194 U. S. 120; *Davis* v. *Farmers' Cooperative Equity Co.*, 262 U. S. 312; *Colorado* v. *Harbeck*, 232 N. Y. 71, 133 N. E. 357.

vened" (Br., p. 55).[50]

The short answer is that the last paragraph of Section 1 of the amended Act, which was identical under the Wagner Act, admonishes the Board to "eliminate the causes of certain *substantial* obstructions to the free flow of commerce" (emphasis added). This reference to "substantial obstructions" does not, as petitioner suggests (Br., pp. 38-39), refer "to labor disputes in general as being a substantial obstruction rather than . . . only to those individual labor disputes which are substantial obstructions." As the Supreme Court indicated in the *Consolidated Edison* case (see *Haleston* brief, pp. 16-17), the phrase means that, notwithstanding the existence of legal jurisdiction, the Board has an overriding obligation to determine, in each case where the employees are not themselves actually engaged in interstate commerce, that commerce is threatened in a substantial enough manner to justify the exercise of federal power. See also quotation from the *Newark Morning Ledger* case, p. 29, *supra.*

That such obligation exists is further demonstrated by *N. L. R. B.* v. *Gulf Public Service Co.*, 116 F. 2d 852 (C. A. 5). There, though holding that as a matter of law the Board had jurisdiction over a utility company with only

[50]It is significant that the distinction which petioner seeks to draw — between a dismissal which is really a refusal to consider and a dismissal "directly connected with eradicating the results of unfair labor practices and affirmatively effectuating the policies of the Act" (Br., p. 54) — does not account for the *Indiana and Michigan* case, 318 U. S. 9, 19. A dismissal for the reason that the charging party has abused Board processes is not "directly connected with eradicating the results of unfair labor practices," and petitioner, troubled by this fact, explains that to give any relief in such situation "would actually fly in the face of the policy of the Act rather than effectuating such policy" (Br., pp. 54-55). As we shall show in the text, the same may be said for a dismissal on the ground of remote effect upon commerce.

local customers, the Court severely criticized the Board for exercising the full measure of its legal power (p. 854):

> . . . it is clear that the direct effect on interstate commerce of any labor disputes in this small . . . business would be comparatively infinitestimal, and that taking cognizance of such disputes, is drawing a fine bead at a gnat's heel, indeed, is almost a *reductio ad absurdum,* a running of the Act, its purposes and policies, into the ground. But the question before us is not one of the wise exercise of, but of the existence of, power . . .

The Court added that the "wise exercise" of this power was a matter of policy, which Congress had entrusted to the "discretion of the board" *(Ibid.)*[51]

Not only does dismissal of a complaint for the reason that the business involved has only a remote effect upon commerce give effect to the policy expressed in Section 1 of eliminating *substantial* obstructions to commerce, it affirmatively contributes to "removing causes of labor disputes or obstructions to commerce". By declining to entertain "local" cases, the Board frees the budget and personnel they would otherwise tie up, and makes them available for cases with a far greater impact on commerce (*Haleston* brief, pp. 43-45). Thus the latter threats to commerce, instead of becoming aggravated while awaiting Board attention, can be promptly headed off. Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, 776, 778.

Accordingly, where the Board, as here, has declined to exercise jurisdiction for the reason that the business involved has only a remote and insubstantial impact on

[51]These views were recently restated in *N. L. R. B.* v. *Mid-Co Gasoline Co.*, 26 LRRM 2416, 2417 (C. A. 5), July 17, 1950. See also *Electrical Workers* case (*Haleston* brief, pp. 41-43).

stantial portion of such supplies from out-of-state. (R. 7-8.) During a comparable period, sales at the San Pedro store totalled $133,715.51, all of which, except for a minor quantity[2], were made to retail customers within the State of California (R. 9-10).

Upon these facts, the Trial Examiner concluded, contrary to the contention of respondent Union, that A-1 Photo was engaged in commerce within the meaning of the Act, and that therefore the Board, as a matter of law, had jurisdiction of the case (R. 10-11, 39). The Trial Examiner, however, noted that (R. 10-11):

> On occasion the Board has declined to exercise its jurisdiction over retail enterprises similar to that of the Employer, but such action has been based on policy considerations not properly within the province of the undersigned. The sole issue confronting the undersigned is whether the Board has jurisdiction over the case at bar, not whether, as a matter of public policy, it should assert it.

As to the merits, the Trial Examiner found that the Union and its Secretary, Haskell Tidwell, had refused to bargain collectively in violation of Section 8 (b) (3) of the Act, but had not committed any of the other unfair labor practices alleged in the complaint (R. 41). The Trial Examiner recommended an appropriate remedy for curing the violation of Section 8 (b) (3), and further recommended that the remainder of the complaint be dismissed (R. 41-43).

Both the Union and the General Counsel filed excep-

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[2]Merchandise valued at approximately $600 was delivered to customers outside of California, and merchandise valued at about $2400 was sold and delivered to installations of the United States Army and Navy (R. 10).

tions to the Trial Examiner's Intermediate Report (R. 45-50).

II. The Decision and Order of the Board sought to be reviewed

On May 13, 1949, the Board, after considering the entire record in the proceeding and the exceptions of the parties, entered an order dismissing the complaint in its entirety (R. 51-60).

The Board accepted the commerce facts found by the Trial Examiner and did not disturb his conclusion therefrom that, as a matter of law, A-1 Photo was engaged in commerce within the meaning of the Act and thus subject to the jurisdiction of the Board (R. 51-53). However, the Board added (R. 53):

> It is clear to us ..... that the Employer's business is essentially local in nature and relatively small in size, and that interruption of his operations by a labor dispute could have only the most remote and insubstantial effect on commerce. Recently, we have dismissed several proceedings involving such enterprises, on the ground that the assertion of jurisdiction would not effectuate the purpose of the Act [footnote omitted]. The Respondents urge that we dismiss this proceeding for the same reason.

The Board then gave careful consideration to the General Counsel's contention that, "once he has issued a complaint in an unfair labor practice case, the Board Members have no authority to decline to assert jurisdiction on policy grounds, if jurisdiction in fact exists" (R. 53-58). The Board concluded, *inter alia,* that neither the provisions of Section 3 (d) of the amended Act nor the intention of Congress to effect a separation of the judicial and prosecuting functions of the agency deprived the

commerce, it has not abdicated its duty and refused to consider the policies of the Act. Rather, the Board, in an exercise of the discretion with which Congress has empowered it, has adopted a course which effectuates these policies just as much as a dismissal for any of the other reasons which petitioner assumes would be proper (Br., pp. 54-55).[52]

There remains petitioner's contention (Br., p. 39) that declination of jurisdiction because of remote effect on commerce cannot effectuate the policies of the Act because of the proviso to Section 10 (a). It is urged that this proviso, by providing for the cession of jurisdiction

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[52]The mandamus cases cited by petitioner (Br. pp. 45-49) are wholly inapposite. In the *ICC* cases, jurisdiction was declined, not because the ICC in the exercise of discretionary authority concluded that this best effectuated the policies of the statute, but because it concluded that the statute did not empower it to act at all. The Supreme Court decisions merely hold that there was statutory power, and that therefore the ICC's assumption that it lacked power was not a valid justification for refusing to assert jurisdiction. They do not hold that, where, as here, there is a valid reason for declining jurisdiction, an administrative agency, whose jurisdiction is discretionary, may not withhold its processes. The holding of the *Jacobsen* case (Br., pp. 40-42) is similarly limited (see *Haleston* brief, pp. 17-20).

For yet another reason, ICC precedents cannot be applied to the Board. The Interstate Commerce Act, unlike the Federal Trade Commission Act and the National Labor Relations Act, creates "private" rather than "public" rights. The interested person may file as of right a complaint before the ICC, and the carrier is required to answer. In other words, the jurisdiction of the ICC is not discretionary, as is that of the FTC and the Board. See *FTC* v. *Klesner*, 280 U. S. 19, 26; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 267-269; Jaffe, *Individual Right of Initiation*, 26 Iowa L. Rev. 485, 512-517.

The relevance of the state cases cited by petitioner is equally remote. They are concerned with arbitrary inaction, which is not the case here. Here, the Board did act. The Board's declination of jurisdiction involved the exercise of discretionary authority conferred by the Act, and effectuated the statutory objectives.

to the states in respect to predominately local industries, evidences a Congressional intention that the Board assert the full measure of its legal jurisdiction.

This contention must also fall. In the first place, petitioner concedes that the General Counsel, notwithstanding the proviso, has discretionary authority to decline to issue a complaint because of remote effect on commerce (Br., pp. 36, 39). If the proviso thus does not preclude the General Counsel from declining to assert the full measure of the Board's legal jurisdiction, neither does it limit the Board. Secondly, Congress, by indicating approval of the Board's policy of declining to assert jurisdiction over essentially local industries (see *Haleston* brief, n. 36, pp. 29-30; H. Rep. No. 1852, 81st Cong. 2d Sess., p. 10), has affirmatively shown that it did not intend the proviso to negate the overriding policy expressed in Section 1.

CONCLUSION

For the foregoing reasons, as well as for those given in the *Haleston* brief, it is respectfully submitted that the relief requested by petitioner be denied.

IDA KLAUS,
Solicitor,
NORTON J. COME,
Attorney,
National Labor Relations Board.

August, 1950.

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National Labor Relations Board.

August, 1950.

APPENDIX

SUMMARY AND HIGHLIGHT STATEMENT
for the
NATIONAL LABOR RELATIONS BOARD

September 15, 1949

Honorable Frank Pace, Jr., Director
Bureau of the Budget
Washington 25, D. C.

Dear Sir:

Transmittted herewith is the 1951 fiscal year budget estimate for the National Labor Relations Board in the amount of $9,000,000.

The basis for estimation, the experience data, the basic assumptions, and the methods used in projecting financial requirements for fiscal year 1951, are detailed in the justification accompanying this memorandum.

The Agency's program, and therefore its financial needs for fiscal year 1951, are influenced in part by two major and novel factors:

1. A slight increase in the estimate of cases to be filed in fiscal year 1951 over recent experience must be anticipated. This increase is traceable to the fact that recently several large labor organizations have, for the first time, either already achieved compliance, or have indicated their intention to achieve compliance, with the registration and filing

requirement of Section 9 (f), (g), and (h) of the Labor Management Relations Act of 1947. The achievement of compliance enables these labor organizations once again to use the services of the National Labor Relations Board and is certain to affect the work load of the Agency for the remainder of fiscal year 1950 and through all of fiscal year 1951.

2. The combination of circumstances which has delayed for more than a year the recruitment of needed additional hearing examiners. Lack of sufficient hearing examiners has caused a serious backlog in one stage of case processing, has delayed the resolution of matters which require trial examiner hearings, and has effected all aspects of the Agency's operations during fiscal year 1949 and the early months of 1950. This projects additional work into 1951.

To arrive at its estimated financial needs for fiscal year 1951, the Agency first set as its objective achieving the desirable situation in which by the end of fiscal year 1951 there would be no abnormal delay at any stage in processing matters before it, so that its administrative machinery could operate with maximum speed. To attain this objective would require approximately $9,450,000, based upon conservative estimates of new case filings in fiscal year 1951, and a careful computation of personnel and other resources required to handle the anticipated work load in all parts of the Agency.

The Agency continues to believe that in the field of labor relations the importance of handling matters brought to it with the greatest possible speed consistent with due process is all important. Because of the two factors outlined above, this constitutes the exceptional circumstances

which we believe justifies a request for funds slightly larger than the Agency's probable 1950 appropriation.

The decision of the Agency to hold its request to a total of $9,000,000 represents a compromise between the estimate of needs determined as explained above, and the Agency's desire to conform to the spirit of the President's statement of policy, expressed in your letter of July 1. The adaptation of its program to an estimate of $9,000,000 means that the Agency must plan to defer until fiscal year 1952 the final attainment of complete currency in its handling of cases at all stages. The proposed estimate will, however, result in a continuing reduction of the trial examining backlog during the fiscal year 1951, and will result in continuing improvement in the speed with which the Agency handles matters brought to it.

There is also transmitted herewith a statement of activities contemplated during the current year and budget year which are aimed at appraising and improving the effectiveness of the Agency's operations. Where appropriate, the anticipated results of these activities are incorporated into the estimates in the form of production rates which are superior to recent performance. Most important, these activities will serve to improve the manner in which the Agency discharges its responsibility for administering its basic statute.

No major changes in the organization or operations of the Agency in fiscal year 1951 are projected at the present time. Minor changes that have already occurred or that are currently planned definitely are specifically mentioned in the justifications.

The estimate includes $50,000 as an amount which might be required for the conduct of national emergency elections under Section 209 (b) of the Labor Management Relations Act of 1947. This amount would be wholly in-

adequate in the event of several large or expensive elections, or even one election in the coal industry, for example. Should such elections materialize, the Agency would be required to request additional funds or defer conduct of its normal activities.

Finally, the Agency recognizes that even with two years' experience under the new law, and however careful its forecasts, the labor relations field is still too volatile, and there are too many variables which could affect financial requirement of this Agency, to permit the making of solid estimates. The accompanying presentation does, however, represent the careful and considered judgment of the Agency as to its 1951 fiscal year needs.

Very sincerely yours,

/s/ PAUL M. HERZOG
Chairman

Lawyers Publishing Co., Inc.—Richmond, Va.

No. 12446

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. W. SMITH, d/b/a A-1 Photo Service,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

The Board's Arguments Which Are Based on Budgetary Considerations Are Neither Relevant Nor Probative.

It would seem manifest that a statute enacted in 1935 and amended in 1947 cannot be construed by the amount of money available to the Board in 1950 or the amount of cases arising in the Board in 1950. As stated in *Parsons v. Herzog*, 85 Fed. Supp. 19 (D. C., D. C., 1949), reversed for lack of jurisdiction, 25 L. R. R. M. 2413 (C. A., D. C.):

> "The Court cannot subscribe to the defendants' [N. L. R. B.] position that the volume of cases which might arise under the statute, if it were construed in a certain light, would be such a prohibitive number as to influence the Court's ruling on the law. The Court must interpret the law as it is written, whether 3600 cases arise or 36,000 cases arise. In

other words, the number of cases which may or may not arise is not a factor which will influence the Court in its judgment."

Parsons v. Herzog, 85 Fed. Supp. 19, 20 (D. C., D. C., 1949).

Of course, if there are insufficient funds and employees to handle all cases, then it is physically impossible for the Board to handle all cases. No question of discretion would be involved in the cases which the Board would thus be unable to handle. It would only be a question of physical possibility. If the General Counsel spends more money than his budget allows, then he must account to the President or Congress, but the act of the General Counsel in going beyond his budgetary limits is no aid of statutory construction whatsoever. The question here relates to the "final authority" of the General Counsel in issuing complaints where jurisdiction admittedly exists. The answer to that question has nothing to do with the wiseness of the exercise of the General Counsel's discretion in picking his cases nor whether he has funds to cover the expense of prosecuting those which he picks. We are concerned with which of two agencies has the power of final discretion; we are not concerned with the wiseness of the exercise of the discretion by either of the agencies. Congress, of course, may be interested in the latter question.

Furthermore, the Board did not dismiss this case because it did not have money to adjudicate it. The Board's dismissal was upon the broad ground that it had discretion to determine from a purely policy standpoint what cases it desired to adjudicate. Physical ability dependent upon funds has nothing to do with policy, and the dismissal was not based upon such physical grounds.

The function of the reviewing court is to review the order of the Board in the light of the adequacy of the grounds given by the Board to support the order. Administrative law requires the Board to disclose the specific grounds upon which its order is based (*Phelps Dodge Corporation v. N. L. R. B.*, 313 U. S. 177). In stating the function of the reviewing court, the Supreme Court has held in *Securities Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 87-88; 87 L. Ed. 626, 633:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."
>
> *Securities Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 87-88, 87 L. Ed. 626, 633.

This court cannot take judicial notice that as a matter of fact the Board does not have sufficient funds to determine all cases presented to it by the General Counsel. The court does not know the cost of processing each case or any particular number of cases. This consideration with respect to budgetary limits constitutes calling things to the court's attention which are outside the record and of which it cannot take judicial notice because of the nature of the facts. The Supreme Court has held that it is error for the reviewing court to consider facts so presented to it.

See:

> *N. L. R. B. v. Newport News Co.*, 308 U. S. 241, 249-250; 84 L. Ed. 219, 225.

The Board's argument also overlooks the point that the General Counsel holds office for only four years and that the next General Counsel, in the exercise of his discretion, may see fit to exercise his prosecuting func-

tion in far fewer cases than the Board desires to hear. In such case, of course, the Board would probably have a surplus of funds. This illustrates the fact of the irrelevance and nonprobative nature of the Board's argument in this connection.

II.

The Board Confuses the Questions of Jurisdiction in Fact and the Wiseness of the Exercise of Jurisdiction.

The Board in its Smith brief, page 4, admits that in the instant case the Board in fact had jurisdiction inasmuch as it found that petitioner was engaged in commerce within the meaning of the Act. Also, the Board has admitted this in an answer filed in this case to petitioner's Statement of Points. The Board also concedes in its Smith brief, page 5, that the issue relates to the claimed discretionary authority of the Board to dismiss a complaint issued by the General Counsel.

Despite the above admissions, the Board in its Smith brief, pages 35-36, and its Haleston brief, page 16, contends that the courts require it to determine in each case if the affect upon commerce would be *substantial* and that the justification of the exercise of the Board's power clearly appear (citing the *Consolidated Edison* case, Haleston brief, page 16, and the reference to "*substantial* obstructions" to commerce in Section 1 of the original Wagner Act). This admission of the Board and its subsequent arguments with respect to the necessity of substantiality of affect as applied in the Board's brief are

inconsistent. Here again the Board criticizes the wiseness of the General Counsel's choice of cases. We point out again that the wiseness of the General Counsel's exercise of discretion is not the issue, but only the question as to the finality of such exercise is at issue.

It is clear from reading *Consolidated Edison v. N. L. R. B.*, 305 U. S. 197 (Board's Haleston brief, page 16) that the court was speaking with reference to establishing legal jurisdiction or jurisdiction in fact, not to the exercise of existing jurisdiction. That case recognizes the distinction between the Board's power over businesses engaged in interstate commerce as such and those not engaged in interstate commerce but which perhaps have some affect upon interstate commerce. The court was only stating that as to the latter type of business the effect should be something more than *de minimus*. This becomes obvious in the light of the cases considered in petitioner's brief, pages 36, 39.

Attention should also be called in this connection to Section 1 of the Labor Management Relations Act of 1947 which amended the National Labor Relations Act. See petitioner's brief, appendix pages 1-2. This section does not mention the word "substantial." Rather it refers to the "normal flow of commerce," to "full production," to "promote the *full* flow of commerce," and three times to the term "affecting commerce" without quantitative description. Also the definition of commerce as contained in the Act (Pet. Br., Appx. 4) uses the term "affecting commerce" without quantitative limit.

The Board takes issue (Smith Br., p. 35) with the petitioner's statement in its brief, pages 38-39, that the reference to "substantial obstructions" in Section 1 of the Wagner Act refers to obstructions in general rather than those in the individual case. The Board itself has always contended to the same effect as petitioner that its jurisdiction is determined in the light of the affect which would occur were the unfair labor practices of the instant case applied generally throughout industry and relying for its position on the same case cited by petitioner.

See:

United Brotherhood of Carpenters and Joiners of America, 81 N. L. R. B. 802;

United Brotherhood of Carpenters and Joiners of America, 80 N. L. R. B. 533.

Furthermore, even if the exercise of the Board's power is limited to instances of substantial obstructions to commerce, then still the Board overlooks the point made by petitioner that the determination of the General Counsel as to whether the case is sufficiently worthy of prosecution is binding upon the Board. In other words, if the question must be determined, then it must be determined by the General Counsel, and his decision thereupon is final.

III.

The Board Does Not Have Its Claimed Discretion Under Sections 9 or 10 of the Act.

A. Section 9 of the Act; Representation Proceedings.

Throughout its Haleston brief the Board assumes that no one takes issue with its position that under Section 9 of the Act relating to representation proceedings it (the Board) has full and complete discretion to act or not act as its policy dictates and that in the application of such policy it is free to decline existing jurisdiction over local businesses. As stated in petitioner's brief in the instant case, this position of the Board is strenuously opposed (Br., pp. 34-35). Of course, the General Counsel has no authority under the Act to initiate or determine questions concerning representation. These are admittedly, so far as the Act is concerned, under the complete authority of the Board itself. Shortly after the enactment of the statute, however, the Board delegated this function to the General Counsel. While we admit the full authority of the Board, to the exclusion of the General Counsel, with respect to representation matters, we do not admit at all that in the exercise of its authority the Board has the discretion to act or not act as it sees fit. It is submitted that the language of the Act itself unambiguously requires the Board to entertain every question concerning representation and to make a determination thereof. The Board is instructed wherever it has *"reasonable cause"* to believe that a question of representation exists to determine such question. When contrasted with the same provision of the Wagner Act which simply provided that the Board "may" investigate such questions, it is clear that Congress intended to make a substantive change in the Board's discretion under Section 9. Indeed, the

Congressional Record is filled with attacks upon the Board for the manner of exercising its discretion under the Wagner Act. It had declined to determine questions of representation when raised by an employee or an employer. The A. F. of L. accused the Board of favoring the representation matters raised by the C. I. O., and Congress clearly determined that this type of proceeding must be forever removed from the Board's discretion and made mandatory upon it. The original bills of each House had similar mandatory provisions. The House Minority Report No. 245 on H. R. 3020, page 85, 80th Congress, 1st Session, itself underscored the word "shall" as it appeared in Section 9(c). The Senate Report No. 105 on S. 1126, page 10, 80th Congress, 1st Session, contains the criticism of the discriminatory policies of the Board in choosing the representation matters which it would resolve, stating that the intent of the Bill was to make it *necessary* for the Board to entertain employee and employer petitions as well. See also page 25 of the same document. The Conference Report No. 510 on H. R. 3020, page 50, 80th Congress, 1st Session, stated in this connection:

> "Both under the House bill and the Senate amendment if there was reasonable cause to believe that a question of representation affecting commerce existed a hearing was to be held. . . . Both the House bill and the Senate amendment provided that if the Board found upon the hearing that a question of representation existed a secret ballot should be held and the results thereof certified.
>
> "The conference agreement, in section 9(c), follows the provisions of the Senate amendment, most of which, as indicated, were also contained in the House bill."

Mr. Taft on the floor of the Senate summarized the criticisms which had been leveled at the Board's exercise of its discretions in these cases and stated that the Senate bill was intended to correct it, 93 Cong. Rec. 3954, April 23, 1947.

Also, Senator Morris stated in this connection:

> "If such petition is filed, the Board is *required* to investigate, and if it believes a question of representation has arisen, it *must* provide for a hearing and an election." (Emphasis added.)
>
> 93 Cong. Rec. 4799, May 7, 1947.

The above references to the Congressional history also show that the Board still has a function to perform in determining whether a question of representation actually exists. The term "question concerning representation" grew up as a word of art under the Wagner Act, and Congress intended that under the amended Act the legal definition of the term would continue. The Board had previously held that a question concerning representation did not exist unless the union seeking the election could make a *prima facie* showing (administratively) of substantial interest (30% by cards) of the employees in it as a representative. The Board also held that such a question did not exist where there was a valid collective agreement in existence with a substantial time to run prior to its expiration. These tests which determine whether a question of representation actually exists may still be applied by the Board. The Act is clear, however, that where under those tests the Board has "reasonable cause" to believe a question concerning representation exists, it *must* resolve such question by an election and hearing.

The construction of Section 9 urged here would not at all occasion "anomalous" results. If the Board were to obey the mandate of Section 9, no such situation would develop for it would act to resolve the question of representation wherever it had jurisdiction and a question concerning representation exists. Complete unity of operation would thereby be obtained because if there were any difference in the coverage of the Act as applied in the two types of proceedings, the coverage of representation proceedings would be the broader. That, of course, is as it should be since the determination of representatives generally precedes the application of the unfair labor practice sections of the Act.

The Board's argument in its Haleston brief, pages 40-41, that it would be discriminatory for it to have to prosecute under a complaint when it refused to act for the same party in a dispute concerning representation is without moment. Unions which fail to comply with Sections 9(f), (g) and (h) of the Act are not entitled to any benefits under the Act, but at the same time they are subject to all of the impediments and restrictions of the Act. Such is not an anomalous situation at all and if it involves discrimination it is the act of Congress and not of the Board.

B. Section 10 of the Act; Unfair Labor Practice Proceedings.

The Board cites many decisions under the old Act (most of them its own decisions) to the effect that the Board had discretion to dismiss complaints for policy reasons (Haleston Br., p. 12 *et seq.*). From this the Board contends in its Smith brief, page 26 *et seq.,* that it now has discretion to dismiss a complaint for the same

reason. This, of course, overlooks the fact that the Act has been substantially amended since the cases mentioned were decided. At that time the Board had final authority to issue complaints and its decision subsequently to dismiss its own complaint did not conflict with any principle of separation of powers. Since the 1947 amendments were intended to effect a full separation of powers, those cases are not in point, and citation of them actually begs the question. It is not necessary to so decide, however, because in each of those cases the policy leading the Board to dismiss was related to the merits of the case itself; see petitioner's brief, pages 54-55.

The Board's argument to support its claim of discretion under Section 10 of the Act (Smith Br., p. 26 *et seq.*) cannot be comprehended by petitioner. The Board insists upon confusing its discretion to effectuate the policies of the Act given to it under Section 10(c) with its claimed discretion to not act at all. Admittedly, the Board has a broad discretion in the framing of its relief so as to effectuate the policies of the Act, but that has nothing whatsoever to do with whether the Board has discretion to determine or not determine whether the policy of the Act has been contravened.

Attention should be called to the Board's statements throughout its brief that the dismissal in the instant case "effectuates the policies of the act." From that assumption the Board points to its broad discretion under Section 10(c) to so frame its order as to "effectuate the policies" of the Act, and thereby seeks to justify its dismissal order. The Board itself did not and could not decide that its order in this case was designed to effectuate the policies of the Act. It decided only that it would not

effectuate the policy of the Act if it exercised its decisional function, something entirely different, and something which would have been more correctly stated if the Board had said that it did not think the case worthy, for policy reasons, of prosecution. That choice of language would clearly have demonstrated that the Board was actually invading the exclusive province of the General Counsel, but the language used should not, because of its similarity to the language of Section 10(c) granting discretion to the Board in the framing of its order, be permitted to confuse the question or conceal the actual holding.

Of course, the Board does contend in its Smith brief, page 36, that the dismissal here does effectuate the policy of the Act by freeing the budget and personnel for more important cases. As discussed elsewhere in this brief, such a standard is neither relevant nor probative. Congress may be interested, but this Court cannot construe a statute by such means. On the Board's theory it would be free to decide that certain types of unfair labor practices, for "policy reasons," would not be determined by it, because it thereby frees its budget and personnel for other unfair labor practices which the Board feels are more important.

For an analysis of the extent of the Board's discretion and a discussion of the issue of this case, see note in 48 Michigan Law Review 1149.

IV.

The Board's Adjudicatory Function.

As stated in our brief, pages 5-6, the General Counsel in deciding to issue a complaint decides: (1) that there is probable cause to believe the existence of unfair labor practices, (2) that there is probable cause to believe the existence of jurisdiction, and (3) that the nature of the unfair labor practices and their affect upon commerce is sufficient to warrant the exercise of the Board's corrective jurisdiction. The Board contends (Smith Br., p. 20 *et seq.*), as we understand them, that there is no difference in the Board's eventual decision with respect to either of these three factors; that if the Board can decide contrary to the General Counsel on the first or second, then for the same reason it may decide contrary to the General Counsel on the third factor. The Board also contends, as we understand them, that with respect to the third factor the General Counsel only makes a probable cause decision rather than deciding the question definitively.

In our brief we did not mean that the Board could reverse the General Counsel on either the first or second factor. The Board decides whether the unfair labor practices and jurisdiction exist in fact. It is not interested in whether the General Counsel had probable cause to believe so. Therefore, the Board does not and cannot reverse the General Counsel on either the first or second factor. On these two factors the Board's analogy to an indictment is helpful, but the analogy ends there. So far as the General Counsel's decision on the third factor is concerned, the Board has no function with respect to it and can make no independent decision on it. This is so

because of the express provisions of Sections 3(d) and 10(c) of the Act. Section 10(c) states that when the matter gets to the Board it shall issue a corrective order or a dismissal depending upon its decision with respect to the existence or non-existence of unfair labor practices. This is mandatory in form and the Board is not given authority to make any other decision.

The Board is further prevented from deciding the third factor itself because such action is inconsistent with its nature as a *quasi-judicial* body as shown in petitioner's brief, pages 35-49. Such assumption of authority is clearly contradictory of the intent of Congress as shown in the legislative history (Pet. Br. pp. 17, 27) from which it is clear that Congress intended the General Counsel, not the Board, to determine what cases would be decided by the Board. In that connection the Board contends (footnote 35, page 24) that these statements refer to the General Counsel's authority to refuse to issue a complaint rather than to his authority in issuing a complaint. This, of course, is a distinction which even the Board itself in its present decision did not make [R. 55].

The Board assumes in its Smith brief (footnote page 16) that the petitioner has conceded that H. R. 3020 as passed by the House did not provide that the Administrator's action would be with final authority. The petitioner intended to make no such concession but stated only that the term "final authority" was not used in the House Bill. However, from the manner in which the House set up the office of the Administrator in H. R. 3020 (Pet. Br., Appx. 11-12) it is clear that the Administrator had such final authority. In the Conference Bill,

since the General Counsel's office was not physically severed from the body of the National Labor Relations Board, it was necessary to use the term "final authority" in order to make it clear that though not separated from the Board physically the General Counsel had the authority provided for the Administrator in H. R. 3020. (See excerpts from the Congressional History in Pet. Br., pp. 20-22.)

V.

The Board's Reliance on the Electrical Workers Case.

In its briefs the Board places great reliance on the case of *International Brotherhood of Electrical Workers v. N. L. R. B.*, 181 F. 2d 34 (C. A. 2), Haleston brief, page 41; Smith brief, page 31.

It is submitted that this case in no way supports the Board's position. The case involved a review of a Board order against a union conducted secondary boycott. The order required the union to cease and desist from such unfair labor practice. The union, in the court, attacked the Board's jurisdiction and also contends that the case was too trivial to justify the exercise of jurisdiction. The court doubts if it could ever determine whether the Board was justified in exercising jurisdiction so long as jurisdiction is possessed by it, and from that statement proceeds to a consideration of the merits of the case. The court gave no consideration whatsoever to whether the Board had any *discretion* in issuing the cease and desist order on the grounds contended for by the union. The division of authority between the General Counsel and the Board is likewise not mentioned. The court clearly did not have the question before it that is involved in the

instant case and obviously, therefore, the decision is no authority on the issue in the instant case. The Board contends in its Haleston brief that if the Board had no discretion in the matter, that that would have been the "short answer" to the union's contention. It would seem apparent, however, that the court gave the "short answer." Since it gave that answer, no assumption can be made as to what answer would have been given to the issue in this case if it had proceeded to its conclusion by that longer route.

VI.

The Legislative History Does Not Support the Board's Position.

On page 28 of its Haleston brief the Board quotes Senator Taft to the effect that the General Counsel in his action is subject to the decision of the Board and the courts. Senator Taft was no doubt referring to the General Counsel's decision with respect to whether the Act had been violated. This is obvious from his reference to the General Counsel being subject to the decisions of the court for as the Board itself so strenuously urges, the question of the exercise of discretion in seeing fit to prosecute or not to prosecute a case is not subject to court review. Likewise, the General Counsel's refusal to issue a complaint is manifestly not subject to court or Board review. (See cases cited in Pet. Br., pp. 11, 12.)

The Board also makes reference in its Haleston brief, page 29, to statements made in committee hearings in 1949 and again in 1950. These statements, none of which were called to the attention of Congress, are not any part of the legislative history of the National Labor Relations Act. Apart from this, however, these particular quota-

tions from Senator Taft were not intended to have the application attributed to them by the Board. The statement (Haleston Br., p. 29) made to Chairman Herzog to the effect that he could overrule the General Counsel came immediately after a discussion with respect to representation proceedings in which the authority of the General Counsel was based solely on a delegation of it to him by the Board. The statement that the Board would have the final word and that the General Counsel should follow the Board's declaration of policy are equally out of context. A careful reading will disclose that the statements refer to determining jurisdiction in fact, and were not directed at the issue in this case.

Senator Taft's actual opinion of the issue before this court is more properly stated on pages 23-24, Hearings Before the Senate Committee on Expenditures in the Executive Department on S. Resolution 248, 81st Congress, 2nd Session. Senator Taft was saying here that the General Counsel was construing jurisdiction in a manner broader than did the Board, and the following followed:

> "SENATOR IVES: Broader than it actually is?
>
> SENATOR TAFT: I think so myself; yes, broader than it actually is. But I think there is one thing in which the Board is wrong. The Board has taken the position, in some cases, apparently, that merely because of size of the concern involved they are not going to interfere, and I think the Board is open to question on that. That will go to the courts, I assume. The General Counsel issues a complaint and you have all the litigation and then it will finally get to the Board and then a year later the Board says, 'No; that case ought never to have been brought because it is not in our jurisdiction.' "

While the last word of the above quotation might seem to indicate that Senator Taft was referring to jurisdiction in fact rather than the power to exercise discretion, it is clear that he actually had in mind this instant case. Otherwise he could not possibly have felt, if he understood the Board as saying they did not have jurisdiction in fact, that they were wrong in rejecting the case. For other relevant discussions by Senator Taft see pages 15-16, 18, 25 of the same document.

All of which is respectfully submitted.

Dated: September 5, 1950.

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